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INTERPLEADER,

AND

ATTACHMENT OF DEBTS.

INTERPLEADER

AND

ATTACHMENT OF DEBTS

IN THE

HIGH COURT OF JUSTICE, AND IN THE COUNTY COURTS,

TOGETHER WITH

Forms of the Summonses, Orders, Affidavits, &c., used therein.

BY MICHAEL CABABÉ

OF THE INNER TEMPLE, BARRISTER-AT-LAW.

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PREFACE.

THERE is no such connection between the two subjects dealt with in the following pages, as renders it necessary to combine them in the same volume. The proceedings whereby a person harassed by conflicting claims is enabled to make the rival claimants fight the matter out between themselves, are quite distinct from the proceedings whereby a judgment creditor is enabled to obtain payment of his judgment debt from persons indebted to his judgment debtor.

Nevertheless practical, if not logical, considerations may afford a justification for treating the two subjects together. Both proceedings are in constant, and, in the complications of civilised life, ever increasing use; and they admit of being completely dealt with in the same volume without necessitating the production of any work save one of a moderate compass and unpretentious character.

The process of foreign attachment in the Mayor's Court of London is referred to, but not dealt with, in

this book, chiefly for the reason that it would be alien to the object and design of the work to include its consideration, while the subject is admirably dealt with in well-known treatises. It may be added that it is difficult to state precisely the position of foreign attachment since the recent decision of the Court of Appeal in the case of *The London Joint Stock Bank* v. *Mayor of London* (L. R. 5 C. P. D. 494.)

6, KING'S BENCH WALK, TEMPLE,
January, 1880.

ADDENDA.

SINCE the completion of this work, a vestige of authority has appeared on the question discussed in the note on pp. 4 and 5, viz., whether the old Chancery jurisdiction in Interpleader still exists? It is the more important for the writer to call attention to it, because it goes to shew that *an interpleader action can be commenced in Chancery.*

The case is one of *Hamlyn* v. *Betteley* (L. R. 6 Q. B. D. 63), and the point decided in it was that when an interpleader issue is directed to be tried in the ordinary form, it must be tried by judge *and jury*, and that the plaintiff in the issue cannot procure that it shall be tried by a judge alone, by giving notice to that effect under Order XXXVI., Rule 3 of the R. S. C., 1875. But in the course of his judgment Lord Selborne, L.C., said, "It is not necessary to decide whether an action of interpleader—which has been substituted for the bill of interpleader —might be tried without a jury, or whether a judge might have power under Order XXXVI., Rule 26, to direct that mode of trial. In the present case, the interpleader proceeding was strictly statutory, being a proceeding under the Interpleader Act (1 & 2 Will. IV. c. 58)."

These remarks are of course "obiter dicta;" but their weight is obvious, especially as the construction of Order I., Rule 2 was greatly discussed in the case.

Page 99, last line but one, add :—

In *Hills* v. *Renny* (L. R. 5 Ex. Div. 313, C. A.), where a claimant to goods seized by the bailiff gave notice of his claim, and then commenced an action against the County Court officers, and the purchasers of the goods from them, it was held that as on the hearing of the interpleader summons the County Court judge would have power to go into the case as against the officers, the action against them should be stayed, but that as, on the construction of § 31 of the Act of 1831, he could not go into the case as against the purchasers, the actions against them could not be stayed.

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INTERPLEADER.

INTRODUCTORY.

To a person in the possession of property admittedly not his own, and whose only anxiety was to hand it over to the rightful owner, out of the two or more claimants who were harassing him in respect of it, the Common Law and the Common Law Courts, until the year 1831, when the Interpleader Act was passed, gave very little assistance.

Interpleader at Common Law before 1831.

Some very slight assistance indeed these Courts did give to a person so situated. Thus, if two persons deposited deeds with a third person to be re-delivered by such depositary according to the terms of an agreement, and one of them then brought an action of *detinue* against the depositary, the latter could give notice of suit to the other depositor and compel him to appear and become defendant in the action in his stead. This proceeding was called *garnishment*, and the substituted defendant was called *a garnishee*.

Again, if under the circumstances above mentioned, *both* the depositors brought actions of detinue against the depositary, or if actions of detinue were commenced severally by two persons against a third who had found

the deeds, the third person was in either case allowed to call upon the two plaintiffs to *interplead*, and the proceeding was called interpleader.

But these remedies by garnishment and interpleader being only available in actions of detinue and under the special circumstances referred to, very little real advantage was gained by them, and with the further exception of a right of interpleading (α) where two writs of *quare impedit* were brought for the same avoidance, (β) two writs *of ward* for the same wardship (γ), each of two persons was found by office in different counties, to be heir of a tenant to the King, the remedy by way of Interpleader was unknown to the Common Law.*

Interpleader suit in Chancery.

The only mode therefore by which a luckless stakeholder harassed by conflicting claims could obtain relief was by filing a bill in Chancery. That Court very early undertook to assist a person so situated, provided that he complied strictly with certain rules and conditions, which it laid down, as necessary for his observance, if he wished to be relieved. This jurisdiction that Court continued to exercise according to its own rules until the year 1875, exercising, indeed, after the year 1831 a *concurrent* jurisdiction with Common Law Courts, in the matter.

Although, since the Judicature Act, 1875, the old jurisdiction of the Court of Chancery, the principles by which it was guided, and the practice by which its proceedings were regulated, are perhaps at an end, nevertheless it

* Those who care to pursue the antiquarian learning about the old Common law garnishment and interpleader, can do so in Viner's "Abridgment," vol. ix., p. 419, *et seq.* "Enterpleader;" and in Reeves' "History of the Law," vol. ii., p. 637, *et seq.*, Finlason's edition.

may be useful here shortly to sketch the nature of a bill of Interpleader in Chancery, more especially as many of the principles now regulating Interpleader practice have been adopted from the practice in Chancery.

To entitle a person to file a bill of Interpleader in Chancery, it was essential (α) that he should be in the possession of property or admit that he owed a debt or duty: (β) that he claimed no interest in the property himself, or was only anxious to discharge his debt: (γ) that he had received notice of conflicting claims to the property or debt in question: (δ) that he was not under any liability to any of the defendants beyond those which arose from the title to the property in contest: (ϵ) that the claimants claimed not under adverse titles, and that their claims were not of a different nature.

If he could comply with these conditions he would proceed to file his bill *stating* his position and rights, and stating the claims of the claimants. He *prayed* that they should interplead and that he should be indemnified, and if he was already being sued at law by either claimant, he would further ask that the action at law should be stayed. To his bill the plaintiff would annex an affidavit alleging that he did not collude with either of the claimants; and if the subject-matter in dispute was money, he would either pay it into Court, or offer by his bill to do so.

The bill could be filed against the Crown; and also where the defendants were out of the jurisdiction.

At the hearing, if the question between the defendants were ripe, the Court could decide between them on the merits; otherwise it would direct proper inquiries, or perhaps the trial of an issue at Common Law; and the

costs of the proceedings would, as a rule, follow the event.*

Such, in very brief outline, was the practice in Chancery, as it existed till 1875.

Interpleader Act, 1831.

Meanwhile, in 1831, the Interpleader Act (1 & 2 Wm. IV. c. 58) had conferred a jurisdiction in Interpleader on the Common Law Courts, and had mapped out a procedure for its exercise. It thus happened that from 1831 till 1875 there were two distinct, though in some respects analogous, methods of interpleading: both, too, independent of one another.

Rules of S. C. 1875, Order I. rule 2.

This being the state of things, it was enacted by Rule 2 of Order I. of the Rules of the Supreme Court, 1875, that "With respect to interpleader the procedure and practice now used by Courts of Common Law under the Interpleader Acts 1 & 2 Wm. IV. c. 58 and 23 & 24 Vict. c. 126, shall apply to all actions and all the divisions of the High Court of Justice, and the application by a defendant shall be made at any time after being served with a writ of summons and before delivering a defence."

The practice, therefore, which now maintains in the High Court of Justice is the Common Law Practice under the Acts of 1831 and 1860: and the present work consists of an examination of that practice.†

* For full details as to the former Chancery practice in interpleader, see Daniell's "Chancery Practice" (ed. 1871), pp. 412-418, and the cases there referred to. See particularly *Crawshay* v. *Thornton*, 2 M. & Cr. p. 1.

† The writer is aware that a difference of opinion exists as to whether the old Chancery practice in interpleader still survives. The recent editors of Daniell's "Chancery Forms," and Seton on "Decrees," seem to think that it does, while Mr. Pemberton, by confining his Forms in interpleader to the Common Law practice, seems to think that

it does not. The whole question, of course, turns upon the true construction of Rule 2 of Order I. (above set out). No doubt that rule does not explicitly state that no proceedings at all in the nature of interpleader shall be taken except under the Acts of 1831 and 1860; but the inference is strong from the juxtaposition of the rule that such is its true meaning.

Rule 1 states how *all* actions shall be commenced, and then, as though it were deemed necessary to provide for the commencement of the somewhat hybrid proceeding of interpleader, Rule 2 provides for the regulation of the practice therein.

If the only operation of the rule was to allow a *defendant* in Chancery to interplead, then surely (α) Order I. would not be the regular place to insert the provision, and (β) the provision would be unnecessary, because, apart from the rule, the result of the Judicature Acts would be to give a defendant in Chancery the right without special provision.

Again, if the old interpleader practice in Chancery still existed, it would seem, since it is not one of the subjects particularly assigned by the Judicature Acts to the Chancery Division, that it would now be equally applicable to the Common Law Divisions. If this were so, there would be two different practices in interpleader, both applicable in all Divisions of the High Court. For this there would be no necessity, for the only respect in which the Chancery practice *materially* differed from the Common Law, was in allowing a person to institute the proceedings as plaintiff, before he had been sued at all. It is, no doubt, worthy of consideration whether it would not be well to allow this right to be still exercised in all the Divisions; but it could scarcely be argued that, in order to preserve it, two different modes of proceedings in interpleader should be unnecessarily considered to co-exist. (*See* ADDENDUM.)

CHAPTER I.

WHO MAY INTERPLEAD.

THE Interpleader Act (1 & 2 Wm. IV. c. 58)* conferred the right of interpleading on two classes of persons, (1) ordinary stakeholders, (2) sheriffs and like officers of the Court. In pursuing therefore the initial inquiry as to what must be a person's position to entitle him to adopt this remedy, it will be well to consider—(1) What must be the position of an ordinary person; (2) What must be the position of the sheriff.

1. WHEN INTERPLEADER PROCEEDINGS MAY BE COMMENCED AT THE INSTANCE OF AN ORDINARY PERSON.

The statutory provisions bearing on this question are 1 & 2 Wm. IV. c. 58, § 1: 23 & 24 Vict. c. 126, § 12: and Judic. Act Rules, 1875, Order I. rule 2.

1 & 2 Will. IV. c. 58, § 1.

By sect. 1 of 1 & 2 Wm. IV. c. 58, it is enacted that

"Upon application made by or on the behalf of any defendant sued in any of His Majesty's Courts of Law at Westminster, or in the Court of the Common Pleas of the County of Lancaster, or the Court of Pleas of the County

* See the Act set out *post*, pp. 105–110, and also the sections in the C. L. P. Act, 1860, dealing with interpleader, set out pp. 112–114, and the other statutory provisions dealing with interpleader.

Palatine of Durham, in any action of assumpsit, debt, detinue, or trover, such application being made after declaration, and before plea, by affidavit or otherwise, showing that such defendant does not claim any interest in the subject-matter of the suit, but that the right thereto is claimed by or supposed to belong to some third party who has sued, or is expected to sue, for the same, and that such defendant does not in any manner collude with such third party, but is ready to bring into Court, or to pay or dispose of the subject-matter of the action in such manner as the Court (or any Judge thereof) may order or direct it shall be lawful," &c. &c.

23 & 24 Vict. c. 126, § 12.

By 23 & 24 Vict. c. 126, § 12 (The Common Law Procedure Act, 1860), it is enacted that "Where an action has been commenced in respect of a Common Law claim for the recovery of money or goods," &c., &c.

Rules of S. C. 1875, Order I. rule 2.

By Order I. rule 2 of the Rules of the Supreme Court of Judicature, 1875, it is provided, that

"With respect to Interpleader, the procedure and practice now used by Courts of Common Law under the Interpleader Acts 1 & 2 Wm. IV. c. 58 and 23 & 24 Vict. c. 126, shall apply to all actions and all the divisions of the High Court of Justice, and the application by a defendant shall be made at any time after being served with a writ of summons and before delivering a defence."

Party interpleading must be a defendant.

1. The first point then to notice is, that the party seeking relief must be a defendant against whom a writ has been issued.

Thus in *Parker* v. *Linnett* (2 Dowl. p. 562), it was held that a person who had been merely *threatened* with legal proceedings and against whom no action had

as yet been brought, was not entitled to interplead. It has indeed been thought (see Wilson's Judic. Acts, p. 129, 2nd edition), that the proper inference to draw from the use of the word "defendant" in Order I. rule 2, of the Rules of 1875, is to render it permissible to commence interpleader proceedings before any action has been brought, and merely after notice of adverse claims. The word "defendant," however, probably only marks the distinction between interpleader at the instance of an ordinary person, and interpleader at the instance of a sheriff.

Exception under Judic. Act, 1873, § 25, sub-sect. 6.

It would, however, seem that in the case mentioned in section 25, subsection 6 of the Judicature Act 1873 (see this subsection set out at length *post*, at pp. 114-15) of a debtor trustee or other person liable in respect of a debt or chose in action thereby rendered assignable and against whom conflicting claims are made in respect of such debt or chose in action, the interpleader proceedings he is thereupon entitled to take, may by the very terms of the subsection be commenced by him before any action has been brought against him. (See *per* Quain, J., *Re New Hamburg Railway Company*, W. N. 1875, p. 239; *per* Field, J., in *Field* v. *G.N. Railway Company*, Jud. Ch. Feb. 22nd, 1878.)

Party interpleading must be a defendant in respect of a claim to money or goods.

2. The party seeking to interplead must be a defendant *in respect of a claim for money or goods.*

The form of the action was important under the Act of 1831, since the relief was confined to the cases of persons sued in assumpsit debt detinue and trover; and so in *Lawrence* v. *Matthews* (5 Dowl. p. 149; & 2 H. & W. p. 123), where the declaration contained a count *in case* as well as in trover, it was held that the defendant could not inter-

plead. Forms of action, however, no longer exist; the Common Law Procedure Act, 1860, enables a person sued in respect of a Common Law claim for the recovery of money or goods to interplead; and Order I. rule 2 of the Rules of 1875, renders the procedure and practice under the Interpleader Acts applicable to *all* actions and all divisions of the High Court. The words "all actions" must not, however, it is submitted, be taken in all their generality. Thus the remedy would not be open to a defendant in an action for the recovery of land, nor to a defendant against whom merely unliquidated damages were claimed. "All actions" probably means all actions in which the subject-matter of litigation is a subject-matter to which interpleader has always been deemed applicable.*

Unliquidated damages are not within the Act. "The claims," said Williams, J., in *Walters* v. *Nicholson* (6 Dowl. p. 517), "must be to something of a definite and tangible nature." And this is no doubt still the case; nevertheless a distinction must be made between cases of claims to unliquidated damages *simpliciter*, and cases where there is a real subject-matter of litigation, and the claim for damages *ultra*, is merely added for what it is worth. (As to these latter cases see *post*, pp. 21-22.) Unliquidated damages.

Title deeds are within the Act. The contrary was Title deeds.

* Parties will hardly be prejudiced by this limitation, since Order XVI. rules 17-21 of the Rules of 1875 provide a machinery by which a defendant can bring in third parties where he is, or claims to be entitled to contribution or indemnity, or any other remedy or relief over against any other person, *or where from any other cause it appears to the Court or a judge that a question in the action should be determined not only as between the plaintiff and defendant, but as between the plaintiff, defendant, and any other person, or between any and either of them.*

held in *Smith* v. *Wheeler* (1 Gale, p. 163 : 3 Dowl. p. 431) : but this case must be considered as overruled by *Roberts* v. *Bell* (7 Ell. & Bl. p. 323 : 3 Jur. N. S. p. 662), where the full Court of Q. B. held that the depositary of title deeds, who was sued for them by A., and had a claim for them made against him by B., was entitled to interplead.

Defendant must be in possession of subject-matter of litigation.

3. The defendant must be in possession of the goods or money, the subject-matter of litigation.

This is essential, for he must be able to dispose of the goods or money in the manner directed by the Court. Of course if he is sued for a debt, it is enough, *e rerum naturâ*, if he is willing to pay it to the claimant entitled to it. Thus in *Regan* v. *Serle* (9 Dowl. p. 193: and 1 W. P. C. p. 31), where the defendant was the acceptor of a bill of exchange, of which both the plaintiff and a third party claimed to be the lawful holders, it was held that the defendant might interplead.

Clear notice of adverse claim necessary.

4. The defendant must have received a clear and distinct notice of the adverse claim. A vague rumour or a mere expectation that some one is going to make a claim will not entitle him to interplead.

Thus in *Harrison* v. *Payne* (2 Hodges, p. 107), it was held that the defendant having no just expectation of being sued by the third party was not entitled to interplead. See to the same effect, *Sharpe* v. *Redman* (1 Will. Woll. & D. p. 375).

Adverse claims must be in respect of same subject-matter.

5. The claim of the third party must be in respect of the same subject-matter in respect of which the defendant is sued.

Thus in *Wright* v. *Freeman* (48 L. J. C. P. p. 276), where the defendant as auctioneer had sold a horse to the

plaintiff, and was sued by the plaintiff for damages for breach of warranty of the horse, while the original owner of the horse claimed from the defendant the price which he had received from the plaintiff, interpleader was not allowed.

So literally indeed was this rule formerly followed, that in *Slaney* v. *Sidney* (3 D. & L. p. 250 : 14 M. & W. p. 800 : 9 Jur. p. 995 : 15 L. J. Ex. p. 72), where the defendant was sued by A. for the price of tea sold to him by A., and sued by B. for the conversion of warrants representing the tea, it was held that he could not interplead. "The one party," said Parke, B., "seeks to have the benefit of a contract and the other the subject-matter of it." This case would hardly now be followed, however; and the Courts would probably now allow Interpleader where the question at issue was substantially the same, although the form of the action might be different in the two cases.

Although, however, the adverse claims must be in respect of the same subject-matter, the remedies sought need not be co-extensive, and any ulterior claims that either party may put forward against the defendant for damages or otherwise will be reserved till the main issue between the adverse claimants has been decided. (See more on this point, *post*, at pp. 21-22.)

Defendant must claim no interest in subject-matter of litigation.

6. The defendant must claim no interest in the subject-matter of litigation; *i.e.* he must be a mere stakeholder.

The cases in which the question has arisen whether or not the defendant has an interest in the subject-matter have been those of warehousemen and dock companies claiming a lien on the goods for storage, and auctioneers claiming a lien for their commission. Thus in *Braddick* v. *Smith* (2 Moore & S. p. 131 : 9 Bingham, p. 84, S. C.), it

was held that a wharfinger claiming a lien could not interplead if the lien only attached upon one of the parties by whom the goods were claimed. In *Cotter* v. *The Bank of England* (3 Moore & S. p. 180: 2 Dowl. p. 728, S. C.), however, it was held that if the defendants claimed a lien *on the goods themselves* and did not seek to attach them against either party, they were entitled to interplead; and this was considered the clear law in the recent case in the Court of Appeal of *Attenborough* v. *St. Katharine's Docks* (L. R. 3 C. P. D. p. 450).

As to an auctioneer's right to interplead, although claiming a lien on the proceeds of the sale for his commission, see *Best* v. *Heyes* (32 L. J. Ex. p. 129: 3 F. & F. p. 113), where, although, as the adverse claimant allowed the defendant's claim to deduct his commission, the point was ultimately not decided, yet the Court of Exchequer all entertained a strong opinion that an auctioneer, although claiming a lien for commission, was entitled to interplead, and refused to follow the decision in Chancery in *Mitchell* v. *Hayne* (2 Sim. & S. p. 63), where it was held that the auctioneer in such a case could not file a bill of Interpleader. "The defendant," said Martin, B., "claims no interest in the original corpus of the property."*

* The case of *Newton* v. *Moody* (7 Dowl. p. 782: 3 Jur. p. 42: 1 W. W. & H. p. 554) in which, where money was due from the defendant to the sister of the plaintiff, and was secured by a promissory note given to the plaintiff by the defendant under which certain sums had been paid to the plaintiff by the defendant, it was held, on the sister forbidding any more money being paid to the plaintiff under the note, and the plaintiff commencing his action, that the defendant could not interplead, "as it was a matter of interest to him to whom he paid the note," would probably not be followed now.

7. The defendant may interplead, although the adverse claimant does not claim an absolute right of property in the subject-matter, but only a lien. Inter-pleader allowed, though claim only to a lien.

This was decided in *Harwood* v. *Betham* (1 L. J. Ex. N. S. p. 180).

8. The defendant must not be guilty of any collusion with either party. Defendant must not collude with either party.

Active collusion would obviously be fatal; but short of this, if the relations between the defendant and either claimant are such as to lead the Court to suspect that there is any understanding between them, it will, in the exercise of its discretion refuse to interfere. Thus in *Belcher* v. *Smith* (9 Bing. p. 82: 2 M. & S. p. 184, S. C.), the Court refused to interfere where the defendant was the uncle and father-in-law of the claimant, and had officiously interposed, by receiving the monies out of which the claims arose, through his nephew. In *Tucker* v. *Morris* (1 Dowl. p. 639) it was held that after the defendant had so far identified himself with the interests of the claimant as to take an indemnity from him, he must be content with that, and the Court would not interfere on his behalf. In *Gladstone* v. *White* (1 Hodges, p. 386), where the defendant seeking to interplead had refused to give up the goods on receiving an indemnity from the plaintiff, who thereupon brought an action in which he made both him and the claimant co-defendants, it was held that the defendant was entitled to relief under the Act.

9. If the defendant is the stakeholder of a sum deposited with him to abide the event of an illegal race, he cannot interplead. Depositary of fund to abide event of illegal race cannot interplead.

This was decided in *Applegarth* v. *Colley* (2 Dowl. N. S. p. 223).

If defendant may be liable to both, he cannot interplead.

10. If the defendant may be liable to *both* the plaintiff and the third party he cannot interplead.

Thus in *Farr* v. *Ward* (2 M. & W. p. 844: M. & H. p. 244), where the defendant had sent the plaintiff his blank acceptance in payment for certain cattle, which acceptance the plaintiff never received, but it came into the hands of the claimants as *bonâ fide* holders for value in the form of a bill properly drawn and endorsed, it was held by the Court of Exchequer that, as the defendant might be liable to both the plaintiff and the claimant, he could not interplead.

Claimants *inter se* must be able to assert same rights as each could against defendant.

11. Very analogous to this last rule is the rule that where in the proposed issue between the plaintiff and the third party, either of them would not have the same position, or could not assert the same rights, as he could assert against the defendant, there interplèader will not be allowed.

Thus in *Dalton* v. *The Midland Railway Company* (12 C. B. p. 458), where the Company were sued by the owner of stock for unpaid dividends, which were claimed by a third party, who had *bonâ fide* become registered as the owner of the stock in the Company's books, both he and the Company being ignorant that he claimed through a forged transfer, it was held as *one* ground for refusing the Company relief under the Act, that in the issue between the third party and the plaintiff, the third party as against the plaintiff could not set up the question of estoppel, which, as against the Company, he claimed to be entitled to set up. So too in the case of *Baker* v. *The Bank of Australasia* (26 L. J. C. P. p. 93: 1 C. B. N. S. p. 515: 3 Jur. N. S. p. 187), where the defendant Bank had accepted a bill of exchange drawn payable to the order of S. A., and S. A. endorsed it to the plaintiff, and the husband of S. A. then gave the Bank notice not to

pay the bill without *his* endorsement, the Court of Common Pleas refused to allow the Bank to interplead, on the ground that in an issue between the plaintiff and the husband, the plaintiff would not be entitled to set up as against the husband the question of estoppel which, as against the Bank, the acceptors, he was entitled to set up. "The question," said Cockburn, C. J., "whether the acceptor is not estopped from denying the payee's right to indorse could not be raised" (*i.e.* in an issue between the plaintiff and husband), and, said Crowder, J., "I apprehend the meaning of the Interpleader Act is to substitute parties in trying the very question in the case." It must not, however, be supposed from this that the mere fact that the defendant has entered into any contract, or assumed a personal obligation towards either the plaintiff or the third party, nor the fact that the remedy which the plaintiff or third party would have open to them in a contest *inter se* would not be coextensive with the remedy they either of them claimed against the defendant, are such as to disentitle the defendant to relief. (As to these exploded doctrines, see *post*, at pp. 17-21.)

One of the claimants *must* be entitled to the property.

12. A more doubtful rule would seem to be deducible from the cases of *Grant* v. *Fry* (4 Dowl. p. 135) and *Collis* v. *Lee* (1 Hodges, p. 204), if these cases are still good law; viz. that the defendant cannot interplead unless one of the adverse claimants *must* be entitled to the subject-matter of litigation.

In both these cases, the plaintiff and the third party claimed from the defendant the reward offered for the apprehension of a criminal; and it was held that as neither claimant might really be entitled to the reward the case was not within the Act. In *Gay* v. *Pitman*

(1 Jur. p. 776 : 5 Scott, p. 795), however, the validity of these decisions seems to have been doubted, and under exactly similar circumstances a rule *nisi* was granted. It is submitted that in such cases it is rather for the defendant to decide whether he is sufficiently protected against ulterior claims than for the Court to decide it for him; and that if he prefers to have the matter settled at once, as between the immediate claimants, and to run the risk of further claims afterwards arising, he is entitled to have the assistance of the Court in carrying out that course.

Defendant must not be remiss.

13. The defendant must not be remiss in asking for relief; he is asking for a favour; and he must deserve it. Under the old practice, a defendant who had twice obtained time to plead, was allowed even then to interplead (*Barnes* v. *Bank of England*, Will. Woll. & H. p. 50 : 7 Dowl. 319). It would not, however, be prudent for a defendant now to postpone his application until after he had twice obtained time for the delivery of his statement of defence. In *Turner* v. *The Mayor, &c. of Kendall* (2 D. & L. p. 197), where the assignees of a bankrupt sued the defendants for money due for work and labour done by the bankrupt for, and under a contract with, the defendants, and the bankrupt's son claimed the monies saying that *he* had done the work, the Court refused to give the defendants any relief, on the ground that a person ought to know with whom he contracts, that it is his own fault if he does not, and that it is not for the Court to assist him in such a case. It should always be remembered, too, to quote the words of Tindal, C. J., in *Belcher* v. *Smith* (9 Bing. p. 82), "that the Act of Parliament is not compulsory, but authorizes the interposition of the Court, at its discretion, upon proper occasions, and

that the duty of the Court is to see that the party applying for the exercise of this discretion, has not voluntarily put himself in the situation from which he calls upon the Court to extricate him."

14. Interpleader will not be granted if the Crown be a party to the proceedings.

No interpleader, if Crown a party to the proceedings.

Thus in *Candy* v. *Maugham* (1 D. & L. p. 745 : 13 L. J. C. P. 17), where the Crown was in the position of plaintiff, the defendant was not allowed to interplead.

15. The Act does not apply to the Colonies (Per *Parke* B. *Colonial Bank* v. *Warden*, 5 Moore P. C. C. 340 : 10 Jur. 745.)

By 11 & 12 Vict. c. 86, § 10, it was extended to the Stannaries.

There were one or two rules adopted by the Common Law Courts in the early history of Interpleader under the Act which much impeded its beneficial operation. One of these was the rule which was adopted from the rule in Chancery suits of interpleader, as laid down by Lord Chancellor Cottenham in *Crawshay* v. *Thornton* (2 Myl. & Cr. p. 1), viz., "that where the party seeking to interplead had entered into any contract with or lay under any personal obligation towards either claimant, he would not be allowed to do so." The plaintiff (in an Interpleader suit) must not, according to Cottenham, L. C., be under any obligation to either of the defendants beyond those which arise from the title to the property in question. The result was that the operation of the Act was much curtailed, as in most cases it is probable that the holder of the goods or money has entered into some obligation, or recognized or held out some right or title of one of the claimants. Thus in *James* v. *Pritchard*

Rule in *Crawshay* v. *Thornton* as to personal obligation.

(7 M. & W. p. 216 : 8 Dowl. p. 890 : 4 Jur. p. 1188), the purchaser of a rick of hay, when sued for the price thereof by the seller, was not allowed to interplead, because it was said that a purchaser could not call upon his vendor to interplead with a third party. So too in *Patorni* v. *Campbell* (12 M. & W. p. 277 : 1 D. & L. p. 397 : 13 L. J. Ex. p. 89), where the defendant had written to the plaintiff promising to hold at his disposal the proceeds of a bill, and in *Lindsey* v. *Barron* (6 C. B. p. 291), where the defendant's testator had given a *written undertaking* that a box of plate should be part of the plaintiff's security for a loan, it was held that the defendant could not interplead. (See too *Horton* v. *Earl of Devon*, 4 Ex. p. 497 : 19 L. J. Ex. p. 52 : 7 D. & L. p. 206, and *Turner* v. *Mayor, &c. of Kendal*, 13 M. & W. p. 171.) However, even before the Common Law Procedure Act of 1860 this rule was not acted upon by the Courts with literal strictness. Thus in *Johnson* v. *Shaw* (4 M. & G. p. 916 : 12 L. J. C. P. p. 112), where the defendant was sued by the assignees in bankruptcy of one Ridgway for goods sold and delivered, and a third party claimed to receive the price on the ground that Ridgway was his factor, the Court allowed the defendant to interplead; and in *Crellin* v. *Leland* (6 Jur. p. 733), where the defendants, bankers, were sued by the plaintiff for the recovery of monies deposited with them by the plaintiff, and they sought to interplead on the ground that the monies were claimed by a third party, who alleged that he had become the husband of the plaintiff, since the deposit, it was held that they were entitled to do so.

Abolished by C. L. P. Act, 1860.

By the Common Law Procedure Act, 1860, § 12, it was provided that Interpleader might be granted "al-

though the titles of the claimants to the money goods or chattels in question or to the proceeds or value thereof have not a common origin, but are adverse to and independent of one another."

It is certainly not easy to see how this provision exactly meets the question of disability arising from any special liability of the defendant to either claimant, but (*per* Blackburn, J., in *Meynell* v. *Angell*, 32 L. J. Q. B. p. 14), "the section enables the Court to give relief whenever it appears in the particular case the relief will be complete and just, even though the claims had not a common origin and were adverse and independent, so that it might possibly be the case that the relief would not be complete and just," and (*per* Bramwell, L. J., in *Attenborough* v. *St. Katharine's Dock Company*, L. R. 3 C. P. D. p. 450), "*Crawshay* v. *Thornton* was decided before the passing of the Common Law Procedure Act, 1860, § 12, and from my own knowledge as one of the Common Law Commissioners I can say that it was intended to do away with the effect of that decision." Accordingly in *Meynell* v. *Angell* (32 L. J. Q. B. p. 14), where the defendant was sued for money due and work done by the plaintiff with whom he contracted for the performance of the work, and a third party gave the defendant notice that the plaintiff was but his agent in making the contract and doing the work, it was held that the defendant was entitled to interplead. Again in *Best* v. *Hayes* (32 L. J. Ex. p. 129: 1 H. & C. p. 718), where the defendant, an auctioneer, had received goods to sell for the plaintiff, and before he had paid over all the proceeds of the sale to him, received notice of a claim from the claimant not to pay over the residue, it was held that he might interplead. In *Evans*

Subsequent cases on the point.

v. *Wright* (13 W. R. p. 468), where the defendant had treated the plaintiff as his tenant, and as such, had both received rent from him, given him notice to quit, and had agreed with him as to the amount due from the defendant in respect of a valuation for tenant-right, and where this sum for tenant-right valuation was claimed by the plaintiff's father who was the original tenant of the premises from the defendant, it was held that the defendant might interplead. So in *Tanner* v. *The European Bank* (L. R. 1 Ex. p. 261), where the defendants had been entrusted by the plaintiff with a policy of marine insurance for the purpose of collecting monies due in respect of a loss, and while the policy was still in their hands, it was claimed by a third party, it was held by the Court of Exchequer that the defendants could interplead. Lastly, in *Attenborough* v. *St. Katharine's Dock Company* (L. R. 3 C. P. D. p. 450: 47 L. J. C. P. 763: 38 L. T. 404: 26 W. R. 583), where the defendants were sued for the detention of wine represented by dock warrants *issued by the defendants* and endorsed for value to the plaintiff and a claim was made to the goods by a third party, it was held by the Court of Appeal (overruling the decision of the Common Pleas Division), that the defendant company might interplead, the decisions in *Meynell* v. *Angell*, *Best* v. *Hayes*, and *Tanner* v. *European Bank* were approved of, and *Crawshay* v. *Thornton* pointed out to be obsolete. Brett, L. J., said, "I cannot think that in this case there was any estoppel, but I confess that in my view, although a defendant in the possession of goods may be technically estopped from denying the plaintiff's claim to them, yet if a *bonâ fide* claim is made to them by a third person, a judge ought to disregard the technical estoppel and to

direct an issue under the Interpleader Acts to try the question as to the property between the plaintiff and the claimant."

Rule as to co-extensive remedy.

Very analogous to the above exploded doctrine was the rule that where the rights claimed against the defendant by the plaintiff and the third party are not *coextensive*, there the Court would not allow interpleader. This was the *ratio decidendi* of the decision of the Common Pleas Division in the case of *Attenborough* v. *St. Katharine's Dock Company*, but the Court of Appeal in reversing that judgment, refused to recognize any such rule. Lord Justice Bramwell said, "I will assume that the plaintiffs have substantial claims (for damages), and whatever orders may be ultimately made in these actions care will be taken to preserve any claims for damages which the plaintiffs fancy they can enforce;" and *per* Brett, L. J., "I cannot agree that in order to entitle a defendant to interplead the remedy of the plaintiff against the claimant must be coextensive with the remedy against him;" and again, "I do not think that the statutes apply merely where the opposing claims are coextensive: I think that they have a wider construction." The proper course in such cases is that mentioned by Bramwell, L. J., above, viz., to reserve any question of ulterior damage or the like, till the main issue between the two claimants has been decided.

Not recognized by C. A. in *Attenborough's case.*

This course seems indeed to have been indicated as early as the case of *Lucas* v. *London Dock Company* (4 B. & Ad. p. 378), where the claimant not appearing was barred, and the plaintiff was allowed to proceed, if he liked, for any special damage sustained by the detention of the wine, the subject-matter of litigation. (See too

judgment of Bramwell, B., in *Tanner* v. *European Bank*, L. R. 1 Ex. p. 264).

Foreigner residing out of the jurisdiction can be called on to interplead.

It was formerly thought that a foreigner residing out of the jurisdiction could not be called upon to interplead (see to this effect *Patorni* v. *Campbell*, 12 M. & W. p. 277, and *Lindsey* v. *Barron*, 6 C. B. p. 291), owing to the difficulty of dealing with such a person. However, on the objection being taken in *Attenborough's case* that the claimant was a foreigner, out of the jurisdiction, Bramwell, L. J., said, "It has been suggested that the defendants ought not to be allowed to interplead because the claimant Lopez is a foreigner residing out of the jurisdiction of the High Court. This is no ground for rejecting this application, although it may be a reason for making him give a security for costs, or having him altogether barred." (As to security for costs, see *post*, pp. 66-68.)

In the very recent case of *Belmonte* v. *Aynard* (L. R 4 C. P. D. p. 221, 352), where the claimants resided abroad, no question was raised at all as to the propriety of interpleader proceedings in such a case, the whole contest being as to whether security for costs should be given.

Equitable claims recognized at Common Law even before Judic. Acts 1873 & 1875.

It was greatly discussed in former times as to whether the Common Law Courts could allow interpleader, when there was anything of an *equitable* character in either of the adverse claims. At first it was thought that it could not. (See *Sturgess* v. *Claude*, 1 Dowl. p. 505; *Roach* v. *Wright*, 8 M. & W. p. 155.) However, this rule was doubted in *Putney* v. *Tring* (5 M. & W. p. 425), and a series of cases before the Judicature Acts (*Rusden* v. *Pope*, L. R. 3 Ex. p. 269; *Duncan* v. *Cashin*, L. R. 10 C. P. p. 554; *Engelback* v. *Nixon*, L. R. 10 C. P. p. 645;

Bank of Ireland v. *Perry*, L. R. 7 Ex. p. 14), decided, that in interpleader proceedings Courts of Common Law would entertain equitable rights. Now by the Judicature Act, 1873, § 24, law and equity are administered concurrently by the High Court.

2. WHEN A SHERIFF OR OTHER OFFICER OF THE COURT IS ENTITLED TO INTERPLEAD.

The statutory provisions dealing with this question are 1 & 2 Wm. IV. c. 58, § 6: and 23 & 24 Vict. c. 126, § 12.

§ 6 of 1 & 2 Wm. IV. c. 58, after reciting that "difficulties sometimes arise in the execution of process against goods and chattels, issued by or under the authority of the said Courts, by reason of claims made to such goods and chattels by assignees of bankrupts and other persons not being the parties against whom such process has issued, whereby sheriffs and other officers are exposed to the hazard and expense of actions; and that it is reasonable to afford relief and protection in such cases to such sheriffs and other officers," enacted, "that when any such claim shall be made to any goods or chattels taken or intended to be taken in execution under any process, or to the proceeds or value thereof, it shall and may be lawful to and for the Court from which such process issued, upon application of such sheriff or other officer made before or after the return of such process, and as well before as after any action brought against such sheriff or other officer, to call before them," &c. &c. 1 & 2 Wm. IV. c. 58, § 6.

By the Common Law Procedure Act, § 12, it was (*inter alia*) provided that where a sheriff or other officer has applied for relief under the Interpleader Act, it may be granted to him, "although the title of the claimants to 23 & 24 Vict. c. 126, § 12.

the money goods or chattels in question, or to the proceeds or value thereof, have not a common origin, but are adverse to and independent of one another."

Sheriff can interplead before action brought against him.

1. By the very words of the 6th section of the Act, the sheriff can interplead before any action is brought against him. (*Green* v. *Brown*, 3 Dowl. p. 337.)

The claim, if made to goods or chattels, must be to chattels taken or intended to be taken in execution.

2. It is necessary that the claim, when made to goods or chattels, should be made to goods or chattels *taken or intended to be taken in execution.* The goods therefore need not have been actually taken in execution; yet, on the other hand, there must exist an intention so to take them.

Thus in *Day* v. *Carr* (7 Ex. p. 883), Pollock, C. B., said, "The Interpleader Act clearly empowers the sheriff to apply to the Court if he goes with the intention of levying under a *fi. fa.* and a claim is set up to the goods, and in many cases he may be well justified in coming to the Court before he perils himself by an actual seizure under circumstances which might perhaps subject him not only to an action for the value of the goods, but also for damages for taking them." So too in *Lea* v. *Rossi* (11 Ex. p. 13 : 24 L. J. Ex. 280 : 1 Jur. N. S. 384), where the sheriff had made several ineffectual attempts to levy on the goods, but had not succeeded in doing so, and took out an interpleader summons *before* seizure, it was held that he was entitled to do so; Parke, B., saying, that in such cases probably the jurisdiction (of the Court to allow interpleader) would be very rarely exercised, and Martin, B., saying that cases might arise in which great injustice would be done if a judge would not interfere unless a sheriff had seized.

However, if he has not seized, he must have *an intention of seizing.* Thus in *Holton* v. *Guntrip* (6 Dowl. p. 130 : 3 M. & W. p. 145 : M. & H. p. 324), where the

sheriff upon a claim being made, withdrew without making any seizure, and then applied to the Court for relief under the Act, his application was refused, the Court saying that "if the sheriff withdraw upon a claim being set up, he does not come to the Court intending to take the goods, but exercises his own judgment."

Sheriff must be in possession of the goods or their proceeds when he applies.

3. If the sheriff has seized the goods, then he must be in possession of either the goods or their proceeds at the time of his application to the Court; and it makes no difference whether or not, when he gave up the goods, or paid over their proceeds, he had notice of the adverse claims.

Thus in *Anderson* v. *Calloway* (1 Dowl. p. 636: 1 C. & M. p. 182), where the sheriff had sold the goods and paid over the proceeds to an execution creditor, before he applied for relief, it was held that the Act did not apply to a case where the sheriff had paid over the money to one of the parties.

So in *Braine* v. *Hunt* (2 Dowl. 391: 2 C. & M. 418), where the sheriff had given up the greater part of the goods seized to the claimant, it was held that he could not interplead. "I think," said Bayley, B., "the sheriff does not act fairly, if he gives up part of the goods: in fact he colludes with the party to whom he delivers them up." (See too, to the same effect, *Kirk* v. *Almond*, 2 L. J. Ex. N. S. 13.) In *Scott* v. *Lewis* (4 Dowl. 259: 2 C. M. & R. 289: 1 Gale, 204), relief was refused the sheriff, where he had sold the goods and paid over the proceeds to the execution creditor, before he had any notice of any adverse claim. In *Inland* v. *Bushell* (5 Dowl. 147: 2 H. & W. 118), where the sheriff had handed over the proceeds of the goods seized to the execution creditor, he

was not allowed to interplead, even although he offered to pay into Court an equivalent sum to the amount levied. Coleridge, J., said, "If the sheriff brings the amount in question into Court, and then the execution creditor is served with the interpleader rule, he would of course not appear, and then his claim would be barred; but barred as to what? Barred as to the money in Court, and not as to the money already in his hands." However in *Anderson* v. *Calloway* (*supra*), the sheriff was allowed to interplead on bringing the amount of the levy into Court, and it is submitted that the Court would now-a-days follow this latter course, since although it is, as Coleridge, J., says, almost certain practically that the execution creditor would not appear, and so the money be paid over to the other claimant, yet *non constat* that the sheriff may not prefer to get rid of the whole matter, even on these terms.

Goods seized need not necessarily be in possession of judgment debtor.

4. The goods need not necessarily be seized in possession of the judgment debtor to entitle the sheriff to interplead.

The Act says nothing about the party being in possession of the goods. Accordingly in *Allen* v. *Gibbon* (2 Dowl. 292), and in *Ford* v. *Baynton* (1 Dowl. 357), in both of which cases the goods were seized while in the possession of the claimants themselves, interpleader was allowed. (See too *Barker* v. *Dynes*, 1 Dowl. p. 169.)

There must be an actual claim to the goods seized or their proceeds.

5. There must be an actual claim to the goods or their proceeds to entitle the sheriff to interplead.

Thus in *Bently* v. *Hook* (2 Dowl. 339 : 2 C. & M. 426 : 4 Tyr. 229), where the only information in the nature of a claim received by the sheriff was that a *fiat in bankruptcy* had issued against the judgment debtor, it was held that this was not equivalent to a claim by the assignees of the

goods, and as such, entitling the sheriff to interplead. So too, in *Tarleton* v. *Dummelow* (5 Bing. N. C. 110), the Court intimated that notice by the solicitor of a petitioning creditor that a fiat in bankruptcy had been issued against the judgment debtor was not such a claim to the goods as to warrant an application for interpleader. And in *Holmes* v. *Mentze* (4 Dowl. 300 : 5 N. & M. 563 : 4 A. & E. 127; 1 H. & W. 608), it was held that a claim by a person as partner of the judgment debtor was not a claim entitling the sheriff to interplead. (See too *per* Lush, J., in W. N. 1875, 204.)

6. The sheriff cannot interplead if the claim is an obviously good one or an obviously bad one.

The claim must not be an obviously good or an obviously bad one.

Thus in *Bishop* v. *Hinxman* (2 Dowl. 166), where the mortgagees of property were in possession of it, at the time of the sheriff's seizure, and claimed the growing crops, it was held that the sheriff could not interplead, as the mortgagees having taken possession of the land, had *primâ facie* taken possession of the crops. So too *In re the Sheriff of Oxfordshire* (6 Dowl. 136), where the sheriff applied for relief, in a case, where, if he had but looked at the date of the execution of the bill of sale under which the claimant claimed, he would have found that it was executed *subsequently to* the date of the levy, and therefore the claim was plainly untenable, his application was refused.*

In *Isaac* v. *Spilsbury* (10 Bing. 3 : 2 Dowl. 211), where a claim to the goods seized was made by the

* *Allen* v. *Evans* (3 L. J. Ex. N. S. 53), where the sheriff applied for relief, and it was granted, although the claimant claimed under an assignment executed *after* the delivery of the writ of *fi. fa.* to the sheriff, would not, it is submitted, be now followed.

judgment debtor's wife, who alleged that they were vested in trustees to her separate use, interpleader was refused on the ground that the claim must be of such a nature, as may be followed by an action; and that here the wife's claim, if any, was only such as could be recognised in a Court of Equity. However, now, the Court would not reject the application, merely because the claim was made by a *cestui que trust* and not by a trustee. In *Salmon* v. *James* (1 Dowl. 369), the sheriff had levied on goods under a *fi. fa.*, and then received notice from several parties that they had subsequently sued out writs against the defendant's goods. On his applying to the Court for relief, it was refused on the ground that he was sufficiently justified in paying over the proceeds of the levy to the first execution creditor, the notices being in fact a mere struggle for priority of claims. (See too to the same effect, *Day* v. *Walduck*, 1 Dowl. 523.)

In *Smith* v. *Saunders* (37 L. T. 359), where the execution debtor claimed to set off a judgment debt he had recovered against the execution creditor, it was held that this was not a claim entitling the sheriff to relief under the Act.

It may be here mentioned, that with respect to claims by landlords, when the claim is for rent, it is the duty of the sheriff, on ascertaining that the rent is really due, to satisfy the claim; and if instead of doing so, he applies to the Court for relief under the Act, his application will be refused. (*Clarke* v. *Lord*, 2 Dowl. 55; and *Haythorn* v. *Bush*, 2 Dowl. 641: 2 C. & M. 689.) In *Bateman* v. *Farnsworth* (29 L. J. Ex. 365) where, the sheriff having seized stock and tenant-right on a farm the landlord

claimed (1) his ordinary rent accrued due; (2) certain penal or additional rent; (3) the tenant-right consisting of manure thrown into the soil and seed sown but not yet sprung up, the sheriff's application was refused on the ground that there was no claim not even in respect of the alleged "tenant-right" to chattels as the property of the claimant, or their proceeds. As to the course which the sheriff should pursue in such a case, Pollock, C. B., said, "He must do as he does in the numerous cases not within the Interpleader Act; take good advice, and do the best he can."

Interpleader allowed though claimant only claims a lien.

7. The sheriff may interplead, although the claimant claims only a lien and not the absolute property in the goods seized. Thus in *Ford* v. *Baynton* (1 Dowl. 357), where the claimant claimed a lien on a horse in his possession, seized by the sheriff, for the keep of it and another horse which had been removed, it was held that the sheriff might interplead. "In the commercial world," said Taunton, J., "a lien may be equal to the whole value of the goods."

And although claimant an infant.

8. The sheriff may interplead, although the claimant is an infant. (*Claridge* v. *Collins*, 7 Dowl. 698 : 3 Jur. 894.) "If there is any difficulty," said Williams, J., "it is one which arises between the litigant parties, but the sheriff at all events is entitled to relief."

Judgment debtor claiming *en autre droit* may be claimant.

9. The sheriff may interplead, although the claim made to the goods seized is made by the judgment debtor himself claiming them, not in his own right, but in some one else's right.

This was so decided in *Fenwick* v. *Laycock* (1 Gale & D. 532 : 6 Jur. 641 : 2 Q. B. 108), where the judgment debtor claimed the goods as executor of a deceased person

in trust for whose legatees he held them; for although the Act expressly refuses relief in the case of claims made by the parties against whom the process has issued, yet the judgment debtor *qua-executor and trustee* is not *the party*, though he is the same person.

Sheriff need not take an indemnity from either party, but if he does he cannot interplead.

10. The sheriff can interplead, although he has not applied for, or has refused, an indemnity from either of the claimants; but if he has accepted an indemnity, he cannot afterwards interplead.

Thus in *Levy* v. *Champneys* (2 Dowl. 454) the sheriff was allowed to interplead although he had refused an indemnity from the execution creditor. (See too *Crossley* v. *Ebers*, 1 H. & W. 216.)

In *Harrison* v. *Forster* (4 Dowl. 558), not only was the sheriff allowed to interplead, although he had refused the claimant's indemnity, but he was not even restrained from selling the goods seized. *Per Cur.* The sheriff has a right to sell, if he thinks proper: if he chooses to accept the indemnity of the plaintiff, instead of any other person, we cannot interfere to restrain him.

In *Ostler* v. *Brown* (4 Dowl. 605 : 1 H. & W. 653), where the undersheriff was alleged to be execution creditor, the sheriff's application was refused on the ground that if the sheriff accepted an indemnity, the Court would not relieve him, and that the relations between the sheriff and the undersheriff were such that the former was entitled to call on the latter to indemnify him for anything done wrong by the latter or his officers.

Sheriff must not collude with either party: he

11. The sheriff must have no interest himself in the matter, and he must not collude with either claimant. These two conditions of course are essential to all proceedings in interpleader; but questions have arisen as to

how far the sheriff could be said to be interested in the matter, from the position of the undersheriff. Thus in the above-mentioned case of *Ostler* v. *Brown*, the sheriff was refused relief, where it turned out that the undersheriff was the son and partner of the execution creditor, an attorney: and previously in the case of *Duddin* v. *Long* (3 Dowl. 137: 1 Sc. 281: 1 B. N. C. 299), where the solicitor for the claimants, assignees of the estate of the judgment debtor, was the partner of the undersheriff, the Court had refused to grant any relief on the ground that there was an intermixing of interest between the sheriff and the assignees.

must not have any interest in the matter.

In *Cox* v. *Balne* (2 D. & L. 718: 9 Jur. 182: 14 L. J. Q. B. 95), where the undersheriff, who was the attorney of certain creditors of the judgment debtor, informed them that the writ of *fi. fa.* had been placed in his hands, whereby the issue of the fiat of bankruptcy was accelerated and the execution frustrated, the sheriff was refused relief. "The undersheriff," said Williams, J., "had no right to make a communication of which the effect might be to hasten more or less the issuing of the fiat, and he ought to have refrained from giving assistance to either party. Where the execution is pending the undersheriff's mouth ought to be closed."

However, the *mere fact* that the undersheriff is solicitor for the claimant will not disentitle him to relief. Thus in *Holt* v. *Frost* (3 H. & N. 821: 28 L. J. Ex. 55), where the undersheriff was the claimant's solicitor, and as such caused notices of his claim to be prepared and served on himself, he was, nevertheless, allowed to interplead, the Court thinking they should grant relief in such cases, unless the execution creditor had been prejudiced by the

conduct of the undersheriff: and with respect to the cases above referred to, Pollock, C. B., said, "There are some old cases in which greater strictness prevailed, where the sheriff's application was defeated under circumstances in which we should not refuse to assist him at the present day."

Sheriff must be prompt in making his application.

12. The sheriff must not be guilty of delay: he must be prompt in making his application.

Thus in *Cook* v. *Allen* (2 Dowl. 11: 1 C. & M. 542), where the sheriff seized the goods on the 10th of December, received notice of the adverse claim on the 15th of December, and did not apply to the Court till January 31st, his application was refused on the ground that he came too late, although there were, in fact, special reasons which partially accounted for his delay.

So too in *Devereux* v. *John* (1 Dowl. 548), where the seizure took place in March, and the application for relief in June, it was held that the application was too late.

In *Ridgway* v. *Fisher* (3 Dowl. 567), where the sheriff received notice of claims to goods seized by him on the 23rd and 26th of January respectively, and he did not apply to the Court for relief till *the Easter Term*, after an action had been commenced against him by one claimant and he had been ruled to return the writ by the execution creditor, it was held that his application was too late, and that he ought to have come in the Hilary Term.

In *Lashman* v. *Claringbold* (2 H. & W. 87) notice of a claim was given to the sheriff two months after the writ of *fieri facias* had been delivered to him; and it was held that as the difficulty he was placed in, arose entirely from his own delay, in not making a levy at all when he might have done so, or by making the levy and keeping

the money in his own hands, he was not entitled to any relief.

In *Beale* v. *Overton* (5 Dowl. 599 : 2 M. & W. 534 : 1 Jur. 544), where the sheriff received notice of a claim on November 28th (three days after the seizure), and did not apply to the Court till the following Easter Term, it was held that he was too late, and that he ought to have applied within such time in the following term as to have enabled the parties to have shewn cause in the term; and (*per* Alderson, B.) the sheriff will not be *safe* in such a case unless he applies within the first four days of the term.

In *Mutton* v. *Young* (4 C. B. 371 : 11 Jur. 414 : 16 L. J. C. P. 309), the sheriff seized (*inter alia*) certain bills of exchange and a promissory note on January 16th, which, not being due, he retained. He received notice on February 18th from the assignees of the judgment debtor that they claimed the bills and note, and *after negotiating with the assignees about the matter*, he applied for relief on April 29th. It was held that his laches disentitled him to relief, and (*per* Wilde, C. J.) "a sheriff who delays his application, at the request, and for the interest of one of the parties, places himself out of the protection of the Act." (See too *Skipper* v. *Lane*, 2 Dowl. 784.)

It may here be mentioned that though the sheriff is not disentitled from obtaining relief by reason of his having been ruled to return the writ by the execution creditor, (the words of § 6 of the Act are "before or after return of such process,") yet in a case where the execution creditor had obtained an attachment against the sheriff for not returning the writ, the sheriff was only

allowed to interplead, on condition of his paying the costs of the attachment. (*Alemore* v. *Adeane*, 3 Dowl. 498.)

If guilty of delay, he must explain it satisfactorily.

13. The sheriff, however, will be entitled to relief, if he can satisfactorily explain his delay, or shew special circumstances, which have occasioned it.

Thus in *Dixon* v. *Ensell* (2 Dowl. 621), where several months had elapsed since the claim was made before the sheriff's application, but negotiations had been going on between the parties with a view to an arrangement, it was held that under these special circumstances, the sheriff was not too late in his application.

In *Barker* v. *Phipson* (3 Dowl. 590), where the writ had issued on the 23rd of December, and the sheriff did nothing but merely take possession, till he received notice of the claim of the assignees in bankruptcy of the judgment debtor on April 7th in the following year, but he had *four days* after he took possession of the goods, received notice of an *intended* fiat in bankruptcy, and also notice of acts of bankruptcy, which would have rendered it unsafe for him to sell, it was held that under these circumstances, the sheriff's application was not too late.

In *Toulmin* v. *Edwards* (Will. Woll. & Dav. 579), where the sheriff, who ought to have applied within the first *four* days of Michaelmas Term, did not apply, till the seventh day of the Term, but gave as his reason for this, that three days before the term began, *another* claim had been made, and he delayed his application, in order to make inquiries in respect of it, it was held that his application was not too late.

However, terms are now abolished, and applications can be made at chambers, more or less continuously

throughout the year, so that the cases dealing with the period of term during which application should be made, are only now authorities, by way of analogy.

It may here be mentioned that it has been decided that, if the sheriff relies on any special circumstances, as excusing his delay, or for any other purpose, he must make a special affidavit of the facts on which he relies: and if he does not, a supplemental affidavit will not be allowed. (*Cook* v. *Allen*, 2 Dowl. 11.)

Sheriff must not have exercised his own discretion in the matter.

14. The sheriff's application will be refused, if he has already exercised his own discretion in the matter.

Thus in *Crump* v. *Day* (4 C. B. 760), where the sheriff after proceeding to the premises of the judgment debtor, to levy under the fi. fa. *withdrew, when he found the property protected by an order of a commission of bankruptcy*, and subsequently sought to seize the goods, and upon a claim *then* being made to them by a purchaser of them from the official assignee, he applied to interplead, the Court held that by originally withdrawing, he had exercised his own discretion, and could not afterwards apply to it for relief. (Cf. too *Braine* v. *Hunt*, 2 Dowl. 391; *Holton* v. *Guntrip*, 6 Dowl. 130.)

Equitable claims.

It remains to mention that, as in ordinary interpleader the fact of the claim being of an equitable nature is now no bar to the relief being given (see *ante*, pp. 22-23), though in early cases it was thought to be a bar. (*Roach* v. *Wright*, 8 M. & W. 155.)

Claims *ultra* for damages for trespass, &c.

With respect to the course adopted where, either the execution creditor or the claimant claim any rights against the sheriff in addition to the mere right to the goods seized, *e.g.* for damages for trespass, &c., see *post*, pp. 81-84, and the cases there cited.

Enlargement of time for sheriff to make his return.

It should be mentioned lastly that the sheriff may, still, as before the Interpleader Acts, apply to the Court to enlarge the time for making his return, and there are cases in which, where he is unable to comply with the conditions entitling him to claim relief by way of interpleader, or where the case is obviously not one for interpleader, his proper course is to apply for enlargement of the time to return the writ. (See *per* Vaughan, J., in *Bentley* v. *Hook*, 2 Dowl. 339; *per* Parke, B., in *Roach* v. *Wright*, 8 M. & W. 157; and *per* Wilde, C. J., in *Mutton* v. *Young*, 4 C. B. 37; *Holmes* v. *Mentze*, 4 A. & E. 131.)

There are cases too, in which the Court, although refusing the sheriff's application for interpleader, have yet, in lieu thereof, enlarged the time for him to return the writ. (See *Holmes* v. *Mentze*, 4 Dowl. 300; *Cox* v. *Balme*, 2 D. & L. 718; *Isaac* v. *Spilsbury*, 10 Bing. p. 3.)

CHAPTER II.

THE PRACTICE IN INTERPLEADER.

HAVING considered what must be the position of a person, whether ordinary stakeholder, or sheriff, to entitle him to seek relief by way of Interpleader, it remains to treat of the proper way to go to work in pursuit of that relief.

The practice, whether the proceedings are commenced by a defendant or a sheriff, is substantially the same; the only differences arising from the different position of the parties and their different relations to the subject-matter. It will be most convenient, therefore, while treating of the two cases separately, yet to include all that is common to both, when considering the practice when the proceedings are instituted by a defendant, and then, shortly, and so far is necessary, without travelling over the same ground, to deal with what is distinctive in the proceedings when instituted by a sheriff.

1. OF THE PRACTICE WHEN THE PROCEEDINGS ARE INSTITUTED BY A STAKEHOLDER.

The statutory provisions as to the practice in this case are :—

1. 1 & 2 Wm. IV. c. 58, § 1, by which it is enacted "that upon application made by or on the behalf of any defendant sued in any of his Majesty's Courts of Law at

1 & 2 Wm. IV. c. 58, § 1.

Westminster, or in the Court of Common Pleas of the County Palatine of Lancaster, or the Court of Pleas of the County Palatine of Durham, in any action of assumpsit, debt, detinue, or trover, such application being made after declaration and before plea, by affidavit or otherwise, shewing that such defendant does not claim any interest in the subject-matter of the suit, but that the right thereto is claimed, or supposed to belong to some third party who has sued, or is expected to sue, for the same, and that such defendant does not in any manner collude with such third party, but is ready to bring into Court or to pay or dispose of the subject-matter of the action in such manner as the Court (or any judge thereof) may order or direct: it shall be lawful for the Court, or any judge thereof, to make rules and orders calling upon such third parties to appear and to state the nature and particulars of his claim, and maintain or relinquish his claim, and upon such rule or order to hear the allegations as well of such third party as of the plaintiff, and in the meantime to stay the proceedings in such action, and finally to order such third party to make himself defendant in the same or some other action, or to proceed to trial on some one or more feigned issue or issues, and also to direct which of the parties shall be plaintiff or defendant on such trial, and with the consent of the plaintiff and such third party, their counsel or attorneys, to dispose of the merits of their claims, and determine the same in a summary manner, and to make such other rules and orders therein, as to costs and all other matters, as may appear to be just and reasonable."

§ 3. By § 3 it is further enacted that "if such third party shall not appear upon such rule or order to maintain or

relinquish his claim, being duly served therewith, or shall neglect or refuse to comply with any rule or order to be made after appearance, it shall be lawful for the Court or judge to declare such third party, and all persons claiming by, from, or under him, to be for ever barred from prosecuting his claim against the original defendant, his executors or administrators; saving, nevertheless, the right or claim of such third party against the plaintiff; and thereupon to make such order between such defendant and the plaintiff, as to costs and other matters, as may appear just and reasonable."

§ 5 provides and enacts that "if upon application to a judge, in the first instance, or in any later stage of the proceedings, he shall think the matter more fit for the decision of the Court, it shall be lawful for him to refer the matter to the Court, and thereupon the Court shall and may hear and dispose of the same in the same manner as if the proceeding had originally commenced by rule of Court, instead of the order of a judge." § 5.

2. By 8 & 9 Vict. c. 109, § 19, a new form of issue was substituted for the feigned issue, which alleged an imaginary wager. (See this section set out *post*, at p. 111-112.) 8 & 9 Vict. c. 109, § 19.

3. By § 14 of the C. L. P. Act, 1860, it is provided that "upon the hearing of any rule or order calling upon persons to appear and state the nature and particulars of their claims, it shall be lawful for the Court or judge wherever, from the smallness of the amount in dispute, or of the value of the goods seized, it shall appear to them or him desirable and right so to do, at the request of either party to dispose of the merits of the respective claims of such parties, and to determine the same in a summary manner upon such terms as they or 23 & 24 Vict. c. 126, § 14.

he shall think fit to impose, and to make such other rules and orders therein as to costs and all other matters as may be just."

§ 15. § 15 enacts that "in all cases of interpleader proceedings, where the question is one of law and the facts are not in dispute, the judge shall be at liberty, at his discretion, to decide the question without directing an action or issue, and if he shall think it desirable, to order that a special case be stated for the opinion of the Court."

§ 16. § 16 enacts that "the proceedings upon such case shall, as nearly as may be, be the same as upon a special case stated under the C. L. P. Act, 1852, and error may be brought upon a judgment upon such case; and the provisions of the C. L. P. Act, 1854, as to bringing error upon a special case, shall apply to the proceedings in error upon a special case under this Act."

§ 17. § 17 enacts that "the judgment in any such action or issue as may be directed by the Court or a judge in any Interpleader proceedings, and the decision of the Court or judge in a summary manner, shall be final and conclusive against the parties, and all persons claiming by, from, or under them."

§ 18. § 18 enacts (merely re-enacting in effect § 7 of the Act of 1831) that "all rules, orders, matters, and decisions to be made and done in Interpleader proceedings under this Act (excepting only any affidavits), may, together with the declaration in the cause, if any, be entered of record, with a note in the margin expressing the true date of such entry, to the end that the same may be evidence in future times, if required, and to secure and enforce the payment of costs directed by any such rule or order; and every such rule or order so entered shall

have the force and effect of a judgment in the Superior Courts of Common Law."

Time for application.

The time, then, for a defendant entitled to interplead to make his application is during the period between his being served with the writ of summons, and before the delivery of his statement of defence. The form of his application may either be by motion to the Court or by summons at chambers. Applications to the Court, however, except in very special cases indeed, do not take place, and the proceedings are almost universally commenced by a *summons at chambers* taken out in the action in which he is already defendant.

Summons at chambers.

This summons will call upon the plaintiff and the claimant to attend before the Master (or Judge) at the time when the summons is returnable on the hearing of an application by the defendant that they should appear and state their claims, &c., and that in the meantime all further proceedings should be stayed. (See form of summons, *post*, in Appendix A, form 1. p. 117.)

Master's jurisdiction in interpleader.

A Master had formerly no jurisdiction in interpleader matters, and so the summons was always a judge's summons; and originally under the Judicature Acts (see Order LIV. rule 2 of the Rules of the S. C. 1875) interpleader proceedings were solely under the jurisdiction of a judge, except in matters of practice. Now, however, by the Rules of Court of November, 1878, rule 4, a Master has full jurisdiction in *all* interpleader proceedings, "except where all parties consent to a final determination of the question in dispute without a jury or special case, and except where the sum in dispute is less than £50 and one of the parties desires such a determination."

In such cases the question shall be determined by a Judge, unless the parties agree to refer it to the Master.

As therefore, with the consent of the parties (*i.e.* the plaintiff and the claimant), a Master has jurisdiction even in the two cases otherwise excepted by the Rule of November, 1878, it is submitted that the proper course for the defendant to take is *always* to take out a Master's summons, and if, upon the hearing, it turns out that the case is one for the Judge's decision, and the requisite consent to give the Master jurisdiction to decide summarily cannot be obtained, it will, if a summary determination is required, be the Master's duty to refer the whole matter to the Judge.

Jurisdiction of District Registrars.

With respect to the jurisdiction of District Registrars in interpleader, it is provided by Rules of the S. C. 1875, Order XXXV. rule 4, that "where an action proceeds in a District Registry the District Registrar may exercise all such authority and jurisdiction in respect of the action as may be exercised by a Judge at chambers, except such as by these Rules a Master of the Queen's Bench, Common Pleas or Exchequer Division is precluded from exercising.

It follows therefore that the jurisdiction conferred on Masters by the above stated rule of November, 1878, is exerciseable also by District Registrars, who therefore, except in the two cases mentioned in that rule, now have full jurisdiction in interpleader proceedings.

Course when defendant sued in two actions.

It was held in an old case, when it was the custom to apply to the Court by a rule, that the defendant, if he be sued by both the claimants, and in different courts, must obtain rules in the actions in each Court. (*Allen* v. *Gilbey*, 3 Dowl. 143.) It seems to follow, by analogy now, that

if the defendant be sued by both parties, his summons must be intituled in both actions, calling on both plaintiffs to appear and state their claims, and asking for a stay of proceedings in both actions. It would probably make no difference whether the actions were commenced in the same or different Divisions of the High Court.

Though no particular form of summons is required, and in *Frost* v. *Heywood* (2 Dowl. N. S. 801: 21 L. J. Ex. 242), a rule calling on the parties to appear before the Court, in order that it might exercise its jurisdiction on the adjustment of the several claims, was held sufficient in its terms, yet it is best to adopt the form now in general use, as far as is possible. Form of summons.

The summons must be duly served on the plaintiff and claimant, or claimants if more than one. As to what constitutes sufficient and insufficient service of a rule or summons on a party called upon to appear, see *Lambert* v. *Townsend* (1 L. J. Ex. N. S. 113), and *Phillips* v. *Spry* (1 L. J. Ex. N. S. 115). Service thereof.

No order will be made against a party not served or insufficiently served: and before an order will be made against a party not appearing, it must be shown by an affidavit of service, that he has been duly served. (See form of affidavit of service, *post*, in Appendix, p. 119, form 4.)

It was held formerly that if any claimant gives notice of his claim subsequently to the obtaining of the rule *nisi*, he can be made a party to the rule, and the rule can be enlarged, if necessary. (*Walker* v. *Kerr*, 12 L. J. Ex. N. S. 204: 7 Jur. 156; *Kirk* v. *Clark*, 4 Dowl. 363.) In the case of proceedings instituted by summons, on a claim being made pending the return of the summons, the summons would probably be adjourned to enable the

new claimant to appear and state his claim, unless there was time to enable him to appear without an adjournment.

Proceedings on summons.

On the return of the summons both the plaintiff and the claimant may appear: neither of them may appear: one of them may, and the other may not, appear.

When neither claimant nor plaintiff appear.

If neither of them appeared, it is submitted that the action against the defendant would be stayed, he obeying the order of the Court as to the disposal of the money or goods in his possession, after deducting his own expenses therefrom. (Cf. *Eveleigh* v. *Salisbury*, 3 Bing. N. C. 298: 5 Dowl. 369: a sheriff's case.)

Where plaintiff does not appear.

If the plaintiff do not appear, it is submitted that the action against the defendant would be stayed: the defendant would be ordered to give up the goods or money to the claimant: all this being without prejudice to any rights the plaintiff might afterwards assert against the claimant. (Cf. *Doble* v. *Cummins*, 7 Ad. & Ell. p. 580: and *post*, p. 76.)

Where claimant does not appear.

If the claimant do not appear, he will be barred from ever prosecuting his claim against the defendant, saving nevertheless his right or claim against the plaintiff: and as between the plaintiff and defendant, the Court will make such order as may be just and reasonable. (Act of 1831, § 3.) The course adopted would no doubt, as a rule, be for the property to be given up to the plaintiff. (See *post*, p. 70, as to defendant's *costs*, when the other parties do not appear.)

Where both appear.

If, however, both parties appeared, then they must be prepared to support their claims by affidavit,* shortly

* Perhaps it is not essential that the plaintiff should appear with an affidavit: an execution creditor need not (*Angus* v. *Wootton*, 3 M. & W.

stating the grounds of their respective claims. (See form of a claimant's affidavit, *post*, in Appendix A., form 3, p. 118: a plaintiff's would be very similar.) The affidavit of the defendant (Appendix A., form 2, p. 118), and also of the other parties, should be intituled in the original action. (*Pariente* v. *Pennell*, 7 Sc. N. R. 834; *Levi* v. *Coyle*, 2 Dowl. N. S. 932.) These affidavits had better be sworn by the parties themselves: but this is not absolutely necessary if it is impracticable. Thus, in *Webster* v. *Delafield* (7 C. B. 187: 18 L. J. C. P. 187: 6 D. & L. 597: 13 Jur. 635), it was held by the Court of Common Pleas that an affidavit by the solicitors to the claimant who resided abroad, alleging that from documents in their possession they believed the claimant was entitled to the property, was a sufficient affidavit to entitle the claimant to have the matter settled by an issue.

Upon this, there are several courses open.

1. *The matter may be decided summarily.* Summary determination.

This course may always be adopted (*a*) with the consent of the parties (*i.e.* of the plaintiff and the third party or parties: § 1 of Act of 1831).

Unless, however, the parties consent, not only to a summary decision, but also that that summary decision shall be made by a Master, the Master has no jurisdiction apart from such consent to decide summarily, save in the one case of the question being purely one of law. (See Rules of Nov. 1878.)

(β) Where the question is one of law, and the facts are not in dispute, the Judge or Master may, in his discretion,

310), but in his case *res ipsa loquitur*. But the plaintiff had *best* be provided with evidence of his case. The claimant *must* (*Powell* v. *Lock*, 3 Ad. & Ell. 315: 1 H. & W. 381).

decide the matter summarily. (C. L. P. Act, 1860, § 15.)

(γ) When the sum in dispute or the value of the goods in dispute is under £50, the Judge may, if it appears desirable and right, decide the matter summarily at the request of either party. (C. L. P. Act, 1860, § 14: and Rules of Nov. 1878.)

In these three cases then a summary decision is allow-
It is final. able. With respect to the summary decision it should be remembered that it is *final* (see § 17 of the C. L. P. Act, 1860, and *Shortridge* v. *Young*, 12 M. & W. 52), and that not even with the consent of the parties themselves can the Judge or Master, after having given a summary decision, give a power of appeal: for he is *functus officio*. (See *Dodds* v. *Shepherd*, L. R. 1 Ex. D. 75: 45 L. J. Ex. 457: 34 L. J. 358: 24 W. R. 322.)*

The order on a summary decision, if made by consent, should state the consent on its face: otherwise it was held in *Harrison* v. *Wright* (13 M. & W. 816), that it would be *bad* as an order, though it may be supported as an award between the parties. (See form of order deciding summarily, *post*, in Appendix A, form 9, p. 121.)

Of course if the matter were to come before the Court in the first instance, it would have the same power of deciding summarily as the Judge at Chambers (§ 1 of Act

* Here it may be remarked for practical purposes that if counsel, or the persons representing the parties, do not consent, or intend to consent to a summary decision, they must not only announce their intention at once, but must also refuse to go into the *merits* of the case, or go into them only so far as to indicate, what, in their view, the next proper steps to take, are; otherwise they may unwittingly have found themselves entrapped by a summary decision, against which there is no appeal.

of 1831), and again if the matter be referred to the Court from Chambers, then, having the power to deal with the matter as if it had originated with it, it may decide summarily.

Substitution of defendants.

2. *The claimant may be made defendant in the action in the place of the defendant interpleading or defendant in some other action* (§ 1 of Act of 1831).

In this case, the action proceeds, exactly like any other action, after the pleadings have been closed to trial. On the trial, the issue would be the issue disclosed by the pleadings.

This order substituting the defendant may be appealed from to the Judge; from him to the Divisional Court; from the Divisional Court to the Court of Appeal, by the party dissatisfied with it.

(See form of order directing this substitution of defendants, *post*, in Appendix A, form 7, p. 120.)

Reference of matter to the Court.

3. *The matter may be referred, just as it is, in toto from the Master to the Judge and from the Judge to the Court, to deal with, and the Court may deal with the matter, just as if it had originated there.* (§ 5 of Act of 1831.)

From the nature of things, this order could hardly be appealed from. But from the order of the Court (or of the Judge, if the matter had been referred to him by the Master), there would be the usual appeal unless the matter was summarily decided.

Special case may be stated.

4. *Where the question is one of law, a special case may be ordered.* (§ 15 of C. L. P. Act, 1860.)

The order directing a special case may be appealed from, like any other order.

§ 16 of the C. L. P. Act, 1860, says that proceedings on a special case shall be like the proceedings on special

case under the sections of the C. L. P. Act, 1852, and error may be brought thereon. Special cases are now regulated by Order XXXIV. of the Rules of the S. C. 1875. Error is now abolished, and appeal substituted: and the judgment of the Divisional Court on a special case may be appealed from in the manner in which appeals are brought according to the provisions of the Judicature Act. The judgment on a special case would be an interlocutory judgment, and the appeal from it would therefore, according to Order LVIII. rule 15, of the Rules of the S. C. 1875, have to be brought within twenty-one days. (Cf. *Standard Discount Company* v. *La Grange*, L. R. 3 C. P. D. 67; and *McAndrew* v. *Barker*, L. R. 7 Ch. Div. 701.) (See form of order directing special case, *post*, in Appendix A, form 11, p. 122.)*

Direction of issue.

5. *The remaining method of dealing with the matter is by the direction of an issue.*

In considering the different questions relating to the issue, the cases relating to the issue in interpleader proceedings at the suit of the sheriff, as well as at the suit of a defendant, must be dealt with, the procedure in the two cases being the same, and the decisions in each illustrating equally the practice in both.

This is the ordinary method of dealing with the matter

* It is to be regretted that a special case is not oftener resorted to, as a mode of settling the question in interpleader. It often happens that no real issue of fact presents itself, and after all the expense and delay of preparing and coming to Court to try an issue, a special case is ordered to be stated, or the jury discharged, and the question reserved by the Judge for further consideration: some little foresight, or effort to arrive at a mutual understanding at Chambers, would have led to the most expeditious mode being resorted to in the first instance.

when there is any disputed question of fact upon which the result will depend.

Form of order directing it.

The order directing the issue will direct as to who shall be plaintiff in the issue and who defendant: as a rule the plaintiff in the action is made plaintiff in the issue, and the claimant defendant, in ordinary Interpleader; and the claimant plaintiff and the execution creditor defendant in sheriff's interpleader.

The order will further direct what shall be the question to be tried between the parties to the issue; where and when the trial shall take place; and what according to the event shall be the disposition as to the payment of costs, or if it is silent as to this, the question will, after the event, be disposed of by the Judge before whom the issue is tried (the general practice), and if not by him, by the tribunal directing the issue. (*Marks* v. *Ridgway*, 1 Ex. 8.) (See *post*, in Appendix A, form 8, a form of order directing issue, p. 121.)

Formerly, before the passing of 8 & 9 Vict. c. 109, the form of the issue was a feigned issue, alleging a pretended wager: by the 19th section of that Act, however, a new form of issue was provided, which with but little variation is the one in use now (see form of issue, *post*, in Appendix B, form 9, p. 129); for although the effect of the Act was not to render a feigned issue illegal (*Luard* v. *Butcher*, 15 L. J. N. S. C. P. 187), yet, as a matter of fact, the feigned issue has now fallen for the most part, out of use.

Order directing issue appealable from.

The order directing the issue may be appealed from, to the Judge, if directed by a Master, and thence to the Divisional Court and the Court of Appeal; or to the Divisional Court direct, if the order is originally made by a Judge.

Practical directions

As to the practical directions with respect to the

for preparing issue.

framing of the issue, the following are given in the last edition of Archbold's Practice, vol. i. p. 733.

"Get a copy of the rule or order for an issue and leave it with counsel with instructions to prepare a draft of the issue. When settled leave a copy of it with the opposite solicitor, who will also have it settled by counsel. In general the rule or order points out the time within which the issue must be delivered and returned. If not so, it must at all events be delivered and returned in a reasonable time. If the counsel on both sides cannot agree upon the form of the issue, you should get an appointment for a meeting between them; and if they are still unable to agree upon the form of it, then the course is to attend before the Judge, and he will decide upon the form of the issue, or refer it to a Master."

All applications relative or incidental to the course of proceedings in the issue should be made to the same tribunal by which the issue was directed. (*Per* Wilde, C. J., in *Hargrave* v. *Hargrave*, 4 C. B. 650.) Thus if the plaintiff in the issue fail to deliver it within a reasonable time, when no time is mentioned in the order limiting the period within which it must be delivered, an order may be obtained, or the original order amended, limiting the time for its delivery, and in the event of this order not being complied with, an order may then be obtained for delivering over the subject-matter of litigation to the defendant in the issue, with costs. (*Stanley* v. *Perry*, 1 H. & W. 669.) Unless founded on a summons, however, this order would only be an order *nisi* in the first instance.

If issue becomes

If the order directing the issue becomes useless, it may be discharged. Thus in *Luckin* v. *Simpson* (8 Scott, 676),

where the effect of an Act of Parliament passed subsequently to the order directing the issue, was to render the trial of the issue useless, the Court which had made the order directing the issue, made absolute a rule to discharge it, in the events which had happened. useless order directing it may be discharged.

Again, if either party have any complaint to make with the frame of the issue, and wish to have it amended, the proper course is to apply to the tribunal which directed it, asking for an amendment of it as required, or for a direction that the issue be framed in accordance with the order (if it be not so framed). (*Shingler* v. *Holt*, 30 L. J. Ex. 318 : 7 H. & N. 65 ; *Price* v. *Plummer*, 26 W. R. 45.)

The object in view in directing the issue, is to inform the conscience of the Court as to who is entitled to the goods or money in question ; consequently the order directing the issue may direct that certain admissions shall be made by either party, in order that the real dispute between the parties may be settled, and that the rightful claimant may not be defeated by the absence of some link in the chain of formal proof. To quote the words of Lord Denman, C. J., in *Woodford* v. *Bosanquet* (5 Q. B. 321 : D. & M. 419). "This is an issue directed by this Court to ascertain certain facts with a view to ulterior proceedings ; and there is no reason why it may not for such purpose vary the legal positions and rights of the parties as in issues directed by the Court of Chancery is constantly done. In such cases, nothing is more usual than that a special direction should be given, not to set up partnership or bankruptcy, or that a witness wholly incompetent in point of law, should be examined upon the trial." Object of issue. Admissions.

See too *Pooley* v. *Goodwin* (5 N. & M. 466 : 1 H. & W. 567), where one of the parties was ordered to make certain admissions at the trial, and the judgment of Lord Denman, C. J.

Cases on construction of the issue.

Here it will be convenient to advert to the cases bearing upon the proper frame of the issue, and the construction to be put upon the words of the issue. This indeed is an important question, as the evidence admissible at the trial must of course depend upon its relevancy to the issue as framed. It is therefore desirable that the issue, while wide enough to include the whole of the substantial question as between the parties to it, should yet not be so wide as to allow either party to set up rights, which, according to the dispute between them, they have no right to set up; and as part of this question, the cases as to whether or not either party to the issue can set up a *jus tertii* will be considered.

When and by whom can *jus tertii* be set up.

In *Morewood* v. *Wilks* (6 C. & P. 144), the question on the issue was expressed to be "whether the said goods and chattels (seized) were the property and goods and chattels of the said plaintiff at the time of their being so seized." This was considered by Tindal, C. J., as equivalent to an allegation that *all* the goods seized were his, but it would seem from the summing up, that in such a case, if the evidence went to shew that *any part* of the goods belonged to the plaintiff, the jury would be directed to find specially. (Cf. remarks of Bramwell, L. J., in *Price* v. *Plummer*, 39 L. T. N. S. p. 567.)

In *Carne* v. *Brice* (7 M. & W. 183 : 8 Dowl. 884 : 4 Jur. 1115), the form of the question was "whether certain apparel taken in execution under a writ of *fi. fa.* was the property of Richard Morgan or not." The *real* point in

dispute between the parties was, whether the defendants, as trustees of R. M.'s wife's property, were entitled to the goods. It was held that the Judge at the trial was right in rejecting evidence offered by the defendant at the trial, to shew that at any rate not Morgan, but his assignees in bankruptcy, had the property in the goods. "The form of the issue," said Parke, B., "ought properly to have been whether the goods were the property of the trustees or not: but in truth that is in effect the question upon this issue :" and again, "The trustees had no right to set up the title of the assignees. This issue is only a process employed for informing the conscience of the Court."

In *Chase* v. *Goble* (2 M. & G. 930 : 3 Sc. N. R. 245), the question on the issue was whether goods of a judgment debtor seized under a *fi. fa.* were at the time of seizure the property of the plaintiff (mortgagees thereof). The defendant (the execution creditor) was held entitled to invalidate the plaintiff's title, by shewing that the deed under which they claimed was an act of bankruptcy. The case was distinguished from *Carne* v. *Brice*, on the ground, among others, that in *that* case the claimants were made defendants, and the execution creditor was plaintiff; but as a rule the execution creditor is made defendant, "because," said Tindal, C. J., "he is in possession."

In *Lott* v. *Melville* (3 Sc. N. R. 346 : 9 Dowl. 882 : 3 M. & G. 40 : 5 Jur. 436) the question on the issue was whether at the time of the seizure of the goods the plaintiffs (the assignees in bankruptcy) were entitled to the same as against, and free from the execution (of the execution creditor), or whether the goods and chattels were subject and liable to be so seized and levied under the

said writ or not, as against the plaintiffs. It was held that this form of issue, put in issue the bankruptcy of the judgment debtor.

In *Linnet* v. *Chaffers* (4 Q. B. 762: D. & M. 14), where the question on the issue, as between the execution creditor (the plaintiff) and the assignees of a debtor was stated to be whether "the aforesaid execution was valid as against the said fiat," it was held that the execution creditor was not entitled by the terms of the issue to dispute the bankruptcy. "If the plaintiff," said Denman, C. J., "wished to try the question as to the validity of the Commission, he should have had the issue pointed to it."

In *Green* v. *Rogers* (2 Car. & K. 148), the question was whether the goods seized were the goods of the plaintiff (the claimant), and the Judge held that on this issue the plaintiff could only give evidence to shew that they were *her* goods; not evidence to shew that they were not the judgment debtor's goods.

In *Rogers* v. *Kenny* (9 Q. B. 592), the question on the issue was whether the plaintiff in the issue had *any* property in the goods. It was held that proof of a *lien* on the goods entitled him to a verdict on the issue.

In *Belcher* v. *Patten* (6 C. B. 608: 18 L. J. C. P. 69: 6 D. & L. 370), the question was whether at the date of the issuing of a fiat in bankruptcy, the plaintiffs in the issue (the assignees in bankruptcy) were entitled to certain goods as against the defendant in the issue (the execution creditor). It was held that on this issue the plaintiffs could not set up any prior execution or distress to defeat the execution creditor. "The question is," said Coltman, J., "whether the assignees are at liberty to set up the rights of third persons, with whom they are in no way

identified and who do not themselves interfere. No doubt the assignees might set up the rights of a third party, provided they claimed under him, but this is an attempt to set up the title of a mere stranger, which clearly cannot be done."

In *Cummings* v. *Ince* (11 Q. B. 112 : 12 Jur. 331 : 17 L. J. Q. B. 105), where the question was, whether the plaintiff on a given day was entitled to certain deeds specified, notwithstanding a certain arrangement alleged to have been entered into on a certain day, it was held that the plaintiff need not prove her *title* to the deeds, the question only being whether *the agreement* prevented her from insisting upon her title.

In *Gadsden* v. *Barrow* (23 L. J. Ex. 134: 9 Ex. 514) the question on the issue was whether certain goods seized were the property of the plaintiff (the claimant) at the time of the seizure. It was held that the defendant might invalidate the plaintiff's title, he claiming under a bill of sale, by proving that a previous bill of sale of the property had been given to a third party.

In *Edwards* v. *English* (26 L. J. Q. B. 193 : 7 Ell. & Bl. 564) the question on the issue was whether the goods seized were at the time of the delivery of the writ to the sheriff the goods of the plaintiff (the claimant). The plaintiff claimed the goods under a bill of sale from the judgment debtor, and it was held that the defendant could *not* set up a previous bill of sale by the judgment debtor to a third party, which was void as against execution creditors for want of registration, but good as against holders of subsequent bills of sale. This case was distinguished from *Gadsden* v. *Barrow* on the ground that in the latter case the bill of sale set up by the execution

creditor was valid for all purposes, while the one set up in this case was void for certain purposes.* If this be the *ratio decidendi* of this latter case, it seems that they both admit the right of the execution creditor to set up a *jus tertii* to defeat the claimant's claim: only the *jus* must be a good *jus*. It is submitted that the true rule is that *although the execution creditor can set up a jus tertii against the claimant, yet the claimant cannot set up a jus tertii against the execution creditor:* and surely this should be so; for if a claimant interferes with a creditor's execution, the creditor should have a right to shew that at all events *the claimant* ought not to have interfered, whoever else perhaps might have done so, but has not: on the other hand, the claimant having caused the issue, by asserting *his* right to the goods, ought not to be allowed to set up a case shewing that the goods belong to third parties, who have not intervened in the matter at all.

True rule as to setting up *jus tertii*.

In *Green* v. *Stevens* (2 H. & N. 146), the question on the issue was whether the goods seized were the property of the plaintiff in the issue (the claimant) as against the execution creditor. It was held that the plaintiff was entitled to succeed in the issue, if she proved that she

* See *Richards* v. *James* (L. R. 2 Q. B. 285), where it was decided that as between two claimants, under bills of sale, to property, if the first bill of sale is avoided as against an execution creditor, owing to want of registration, it is avoided for all purposes, and cannot be set up by the holder, to defeat the claim of the holder of the subsequent bill of sale. Now by The Bills of Sale Act, 1878, § 10, sub-sect. 4 (41 & 42 Vict. c. 31) bills of sale over the same chattels have priority in the order of the date of their *registration*. See too *Ex parte Payne, in re Cross*, L. R. 11 Ch. Div. 539 (C. A.).

Perhaps the commonest form of interpleader issue is that in which the claimant is the holder of a bill of sale of property seized by a sheriff. For the law of Bills of Sale generally, see Wilson on Bills of Sale.

was lawfully entitled to the *possession*, even though the goods had only been lent to her. Pollock, C. B., said, "The issue in the present case is not whether the goods were the property of the plaintiff absolutely, but whether they are hers as against the defendant. My impression is that this form of issue has been adopted for the express purpose of enabling any person lawfully entitled to possession to sustain his claim."

In *Richards* v. *Johnson* (28 L. J. Ex. 322), the question on the issue was whether certain goods seized by the sheriff were at the time of seizure the property of the plaintiff in the issue (the claimant) as against the defendant (the execution creditor). It was held that in this issue the defendant was not estopped from proving that the goods were the goods of the judgment debtor, although the judgment debtor himself as against the plaintiff would have been so estopped.

In *Shingler* v. *Holt* (30 L. J. Ex. 322 : 7 H. & N. 65), the question was whether the goods seized were at the time of delivery of the writ to the sheriff, the goods of the plaintiff in the issue (Sarah Shingler); on the hearing it was agreed that the issue must be treated as if amended by the addition of the words "as against the execution creditor." The Court refused to set aside a verdict for the plaintiff, on the ground that Sarah Shingler was a married woman of the name of Sarah Boddy. The Court said the jury had decided on the issue before them; that the question of law, if any, as to a married woman holding property was not a question for the jury, *and that the Judge at Chambers would deal there with the verdict on the issue when it was returned to him.*

In *Price* v. *Plummer* (25 W. R. 45), where, on a sheriff interpleading, the usual order was made directing an issue to try whether the goods were the goods of the claimant or not, and the form of the issue was "whether the goods or any part thereof were the goods of the claimant at the time of seizure;" it was held that the defendant in the issue was entitled to an order directing the claimant to specify the goods claimed by him. Here it is obvious that if the goods not claimed by the claimant should be of sufficient value to satisfy the execution creditor's debt, the issue would be a useless expense.

In this same case it appears that the claimant did not comply with the order directing him to specify the goods claimed by him, and on the issue, it turned out that the *greater part* of the goods belonged to the claimant, and the residue, not to the judgment debtor, but to third parties. It was held by the Court of Appeal, reversing the decision of the Common Pleas Division (39 L. T. 38, 657: 26 W. R. 682), that the claimant was entitled to a verdict, and his costs. "I am clearly of opinion," said Bramwell, L. J., "that the form of the issue is of no consequence. It is directed for the purpose of informing the conscience of the Court. The issue is not decided against the claimant if he claims all the goods and it turns out that he is only entitled to some, but it is to be taken distributively, and it means, Are these goods or part of them, and if so what part, the property of the claimant?"

In *Saunders* v. *Perrin* (22 L. T. N. S. 419) it was held that a mistake on the face of the issue as to the statute under which it was directed, was immaterial.

In *Schroeder* v. *Hanrott* (28 L. T. N. S. 704) it was held that the claimant was entitled to succeed on the

issue, as against the execution creditor, although he was only a *cestui que trust*, and the trustees ought technically to have been parties to the issue.

Interrogatories and other matters antecedent to trial of issue.

Interrogatories may be delivered on the issue, as in an ordinary action. (*White* v. *Watts*, 31 L. J. C. P. 381 : 12 C. B. N. S. 267.)

As in the ordinary case of issues ordered to be tried, *e.g.*, by the Court of Chancery, the proper tribunal to apply to for a postponement of the trial would be the tribunal directing the issue. (*Kebell* v. *Philpot*, 9 Sim. 614.)

The issue will be entered for trial, or come on for trial at the assizes where it is directed to be tried like any ordinary action.

In case of either party to the issue relinquishing or abandoning his claim, before the trial comes on, the successful party must apply for the costs to the tribunal directing the issue : he must apply on an affidavit intituled in the original action. (*Elliott* v. *Sparrow*, 1 H. & W. 370.)

Where the money the right to which was being tried, was in Court to abide the event, and the plaintiff in the issue failed to proceed to try it, on an application to the Court to get the money paid out, the Court would only grant a rule *nisi*. (*Stanley* v. *Perry*, 1 H. & W. 669.)

It would follow that when the application is made at Chambers, the party seeking to obtain the fund, would call on the party in default by *summons* to appear to shew cause why the fund should not be paid out, and unless some good cause could be shewn, it would then be ordered to be paid over to the applicant.

In *Lydall* v. *Biddle* (5 Dowl. p. 244), where the

plaintiff in the issue failed to proceed to trial, and the defendant wished to get an order at once substituting another claimant, in the place of the defaulting party, the Court would only grant a rule *nisi*, calling on both the party who had failed to proceed to trial, and the party whom it was sought to substitute for him.

In *Kimberley* v. *Hickman* (1 Saunders & C. B. C. 90), where the plaintiff in the issue made default in proceeding to trial, the terms on which the Court allowed him to have the question tried were that he should pay the costs of the day when he failed to appear; but the costs of the application on which the Court made this order were ordered to abide the event.

In *Wicks* v. *Woods* (26 W. R. 680) the order directing the issue reserved the question of costs. The plaintiff apparently not proceeding to trial with proper despatch, the defendant obtained an order that unless the plaintiff gave notice of trial "by Monday next peremptorily," and proceed forthwith to enter the case for trial, *the original order should be discharged.* The plaintiff failed to comply with these conditions, and it was held that the defendant had a right to the costs of the proceedings, in spite of the terms of the order discharging, in the event which had happened, the original order.

The trial.

If both parties appear at the trial the proceedings thereat resemble the proceedings at the trial of an ordinary action. Thus, in sheriff's interpleader, the plaintiff (*i.e.* the claimants) who has to prove his case, and make good his title to the goods seized, is entitled to begin at the trial (*Edwards* v. *Matthews*, 16 L. J. Ex. 291); and if the Judge ruled wrongly as to the proper person to begin, this would not be ground for a new trial

of itself, unless some manifest injustice was done thereby, and this would be still more the case since the Judicature Act. (See Rules of S. C. 1875, Order XXXIX. rule 3).

Reception of evidence thereat.

With respect to the reception of evidence at the trial, though it seems that formerly the rules regulating its admissibility were not adhered to with the same strictness as in ordinary trials (see *Pooley* v. *Goodwin*, 5 N. & M. 466), yet according to Mellor, J., in *Emmott* v. *Marchant* (L. R. 3 Q. B. D. 556), of late years there has been no difference between the evidence received upon the trial of an interpleader issue and in other cases. In *Coole* v. *Braham* (18 L. J. Ex. 105 : 3 Ex. 183), where the question between claimant and execution creditor was as to the validity of an assignment under which the claimant claimed the goods of the judgment debtor, which had been seized, it was held that the judge at the trial rightly rejected an alleged admission of the judgment debtor to his brother, (the execution creditor not being present,) that he owed monies to the claimant. (See too as to the admissibility of evidence, *Smith* v. *Yorke*, 21 L. J. Q. B. 53.)

In *Gugen* v. *Sampson* (4 F. & F. 974), where the claimants to the goods seized were the trustees of a post-nuptial settlement made in pursuance of an ante-nuptial agreement, it was held that a certificate of registration of the settlement as a bill of sale was sufficient evidence of a due registration, *i.e.* of registration with a proper affidavit: and Channell, B., said, that such objections should not be made on the trial of interpleader issues. (See however *Emmott* v. *Marchant*, L. R. 3 Q. B. D. 556, as to the correctness of the ruling in this case as to the sufficiency of the evidence of due registration.) In

Gayton v. *Espin* (1 F. & F. 722), where the purchaser from the claimant as well as the claimant had been made a plaintiff in the issue, Bramwell, B., refused to allow counsel for the purchaser from the claimant to address the jury. In *Williams* v. *Grey* (19 L. J. C. P. 382), where a bond was conditioned to be void in the event (among others) "if the claimant should proceed to try the issue," it was held that the fact that when the issue came to be tried, the parties agreed to withdraw a juror, and the claimant subsequently neglected to proceed to trial according to a judge's order, was not such as to entitle the claimant to say that the condition of the bond had been fulfilled. In *Hornidge* v. *Cooper* (27 L. J. Ex. 314), where the claimant claimed the goods as the purchaser thereof from the sheriff, who, it appeared from the evidence had seized them, before the execution creditor had recovered his judgment, it was held there was sufficient evidence of the sheriff's right to sell the goods, to warrant a verdict for the claimant.

In *Blackmore* v. *Yates* (2 L. R. Ex. 225) the question upon the issue was whether the property in certain rolling stock of a Railway Company was in the plaintiff as against the defendant (an execution creditor of the Company). The rolling stock had been transferred by the Company to the plaintiff, as one of the terms of compromise of an action, commenced by the plaintiff, on behalf of persons beneficially interested in a Lloyd's bond, against the Company. It was held that the judge at the trial was right in rejecting evidence tendered on behalf of the defendant, for the purpose of showing that the Lloyd's bond was *originally* void, on the ground that the original validity of the bond could

not be disputed in this issue; the only question being whether the transfer of the rolling stock by the Company to the plaintiff was or was not *ultra vires* and invalid.

Proceedings subsequent to trial.

With respect to the proceedings subsequent to the trial, it may be stated broadly that the matter may run the gauntlet of all the proceedings incident to the trial of an action. Thus, the plaintiff may be nonsuited. (*Gugen* v. *Sampson*, 4 F. & F. 974; cf. *Barnes* v. *Headley*, 1 Camp. 164.)

New trial.

A new trial may be applied for by either party, on the grounds on which new trials always are applied for, and the application may be either granted or refused on the usual grounds. (*James* v. *Whitbread*, 20 L. J. C. P. 217.)

Findings remitted to chambers.

The verdict on the issue may be either a general verdict for the plaintiff or defendant, or it may be a special verdict: and in this latter case, it would seem from the cases of *Bird* v. *Crabb* (30 L. J. Ex. 318) and *Holt* v. *Shingler* (30 L. J. Ex. 322), that the findings ought to be taken to chambers before the tribunal which directed the issue, which can order judgment to be entered up, according to what it deems to be the law on the findings.

Appeal.

However, if the judge at the trial gives judgment for either side (and this is sometimes done), this judgment may be appealed from to the Court of Appeal, just as the ordinary judgments of a judge may be appealed from. (*Witt* v. *Parker*, 46 L. J. 450.) So too applications for new trials, or for a nonsuit, or leave to enter verdict for the other side, may be made to the Divisional Court, and from their order an appeal lies, as in other cases (*Withers* v. *Parker*, 4 H. & N. 810), for the words of sections 34 and 35 of the

C. L. P. Act, 1854, give this full right of appeal, which is not interfered with by the Judicature Acts.

However, it is submitted that if a judgment be given on the verdict by the Judge or Master directing the issue when the case is brought back to them, this is a judgment from which according to the provisions of § 17 of the C. L. P. Act, 1860, no appeal lies.

In *McAndrew* v. *Barker* (L. R. 7 Ch. Div. 701), it was decided that the order made on the trial of an interpleader issue by a Judge in Chancery without a jury was an interlocutory order; and consequently the appeal from it should, according to Order LVIII. rule 15, of the Rules of S. C. 1875, have been brought within twenty-one days.

Entry of proceedings of record.

§ 18 of the C. L. P. Act, 1860, (re-enacting for the most part § 7 of the Interpleader Act, 1831,) provides that all rules, orders, matters, and decisions to be made and done in interpleader proceedings (excepting only any affidavits) *may*, together with the declaration in the cause, if any, be entered of record, with a note in the margin expressing the true date of such entry, to the end that the same may be evidence in future times if required, and to secure and enforce the payment of costs directed by any such rule or order; and that every such rule or order so entered shall have the force and effect of a judgment in the Superior Courts of Common Law.

In *Lambirth* v. *Barrington* (4 Dowl. 126 : 2 B. N. C. 149), it was held, that under § 7 of the Act of 1831, rules can only be entered up of their true date, not *nunc pro tunc*.

The cases of *Cooper* v. *Lead Smelting Company* (1 Dowl. 728), and *Bland* v. *Delano* (9 Dowl. 293), decide that judgment must be signed on the verdict, ere money in

Court will be paid over to the successful party. By the very words of § 2 of the Act of 1831, it is the *judgment* that is final and conclusive.

In spite of the decision in *Dickinson* v. *Eyre* (7 Dowl. 721), where it was held that a judgment entered up in the ordinary way and not as directed by § 7, could be set aside for irregularity, the power given to enter the proceedings of record, is optional, and as a matter of fact, the proceedings are now very seldom so entered. For the purposes of enforcing the payment of costs, this course is not necessary: thus in *Cetti* v. *Bartlett* (9 M. & W. 840), it was held that a party entitled to costs under an interpleader order was not bound to take out execution under § 7, but might make the order a rule of Court and take out execution under 1 & 2 Vict. c. 110, § 18; and now by Order XLII. rule 2, of the Rules of S. C. 1875, it is enacted that every order of a Court or a judge, whether in an action, cause, or matter, may be enforced as a judgment to the same effect; so that execution for costs can be obtained under this rule, if there is an order directing payment of costs. As a matter of fact, the order directing the issue generally postpones the question of costs, and they are, as a rule, dealt with by the Judge who tries the issue. If, however, he does not deal with them, it would seem that the successful party should apply to the tribunal directing the issue, calling upon the unsuccessful party to show cause why the money in Court should not be paid out to the successful party, and why he should not get his costs of appearance, trial, and that application. (*Matthews* v. *Sims*, 5 Dowl. 234.) The affidavit on which this application is made should be entitled in the original action, and not in the issue. (*Levi* v. *Coyle*, 2 Dowl. N. S. 932.)

Rules of S. C. 1875, Order XLII. r. 2.

In *Smith* v. *Clinch* (2 Dowl. N. S. 48), the Court would not refuse to allow the successful party (an administratrix) to have the fund out of Court, on the ground that there was a creditor's suit pending; and an injunction, alleged to have been granted by the Court of Chancery not to pay the monies out to her, had not been served on the officers of the Court of Q. B. "As against the defendant," said Wightman, J., "the plaintiff is entitled to recover this sum."

Pending any appeal which the unsuccessful party is entitled to bring, the money in Court will not be paid out to the so far successful party. (*King* v. *Birch*, 7 Q. B. 669.)

In *Best* v. *Pembroke* (8 L. R. Q. B. 363), a person who had obtained an order for the costs of an interpleader issue, and entered it of record pursuant to § 7 of the Act of 1831, so as to have the effect and force of a judgment, was held not to be a judgment creditor within the meaning of the garnishee clauses (§§ 60 and 61) of the C. L. P. Act, 1854, and *Hartley* v. *Shemwell* (30 L. J. Q. B. 223) in so far as the decision therein conflicts with this, must, it seems, be considered as overruled.

Security for costs.

With respect to the principles on which either party in interpleader proceedings will be compelled to give security for costs, it was held in *Benazech* v. *Bessett* (2 D. & L. 801), that the plaintiff in the issue being a foreigner residing out of the jurisdiction, the defendant in the issue (the adverse claimant) was entitled to have security for costs, the Court saying that the defendant should be in the same position as any other defendant, and that the mischief existed in this case, as in any other.

In *Williams* v. *Crossling* (4 D. & L. 660), where the defendant in the issue (an execution creditor) resided out of the jurisdiction, it was held that the plaintiff in the issue had a right to have security for costs given by the defendant. (See too *per* Bramwell, L. J., in *Attenborough* v. *St. Katharine's Docks Company*, L. R. 3 C. P. D. 455.)

In *Deller* v. *Prickett* (20 L. J. Q. B. 151) the defendant, seeking to interplead, was only allowed to do so on giving security for the plaintiff's costs, the defendant he sought to substitute having no other property than that, the dispute as to the title to which, occasioned the interpleader proceedings. It may be doubted, however, whether such a restriction, or limitation, would now be put on a defendant's right to interplead.

However, in *Ridgway* v. *Jones* (29 L. J. Q. B. 97), where, upon the defendant interpleading, an issue was directed between the plaintiff in the action (who was made defendant in the issue) and the bankrupt (of whose estate the plaintiff in the action was assignee, the bankrupt claiming the monies in dispute as the executor of a third party), who was made plaintiff in the issue, it was held that the defendant in the issue was not entitled to have security for costs from either the defendant interpleading, or the plaintiff in the issue.

In *Frost* v. *Heywood* (2 D. N. S. 801), a banker interpleaded, being sued for monies he held, belonging to a customer, by the assignees in bankruptcy of the customer; a person of whose estate the customer was trustee being the claimant. The Court ordered an action to be brought in the name of the bankrupt against the assignee, the *cestui que trust* to give security for the defendant's costs.

In *Mellin* v. *Dumont* (17 W. R. 673), where the defendant

in the issue (an execution creditor) resided out of the jurisdiction and had been ordered to give security for costs, but had not done so, the Court after the lapse of six months made an order that unless the defendant in the issue gave security within fourteen days, the money in Court was to be paid out to the plaintiff in the issue.

But the mere fact that a person is plaintiff in the issue, does not entitle the defendant to call upon him to give security for costs, if he resides out of the jurisdiction any more than, on the other hand, does the mere fact, that a person is defendant in the issue relieve such person from giving security, if his position is that of a plaintiff.

Thus in *Belmonte* v. *Aynard* (L. R. 4 C. P. D. 221 and C.A. 352), where the plaintiff in the issue, who resided abroad, was really rather in the position of the party sued than the party suing, but had been made plaintiff in the issue solely for the convenience of the proceedings, while the defendant in the issue was practically the plaintiff, it was held that the plaintiff in the issue could not be called upon to give security for costs. Denman, J., said, "I think the principle upon which security for costs is ordered is clearly this, viz., that one who is substantially in the position of plaintiff initiating an action, and is a foreigner residing abroad, shall be bound to give security for costs."

Costs.

Costs in Ordinary Interpleader. The costs of the proceedings are by the very words of § 1 of the Act of 1831 in the discretion of the tribunal before which the proceedings are instituted.

However, in exercising this discretion, the Courts and Judges have adopted certain rules, which, under ordinary

circumstances would always be followed. Remembering then that there are the costs of three parties to be dealt with, viz., those of the defendant interpleading, of the plaintiff, and of the claimant, the first general rule is that if the defendant *bonâ fide* applies for relief, and his position is that of an innocent stakeholder, he will get his costs: and these will be a first charge upon the fund or subject-matter in dispute; the sum by which the fund is diminished by the amount of these costs, being ultimately made up by the unsuccessful to the successful disputant. This rule was laid down in the case of *Duear* v. *McIntosh* (2 Dowl. 734), and has always been followed. See *Cotter* v. *Bank of England* (2 Dowl. 728); *Parker* v. *Linnett* (2 Dowl. 564), and *Attenborough* v. *St. Katharine's Docks Company* (L. R. 3 C. P. D. 450).

However, if all parties are before the Court, it can order the unsuccessful party to pay the defendant's costs *directly*, and then the subject-matter of litigation can be given up to the successful party, discharged from any lien upon it for the defendant's costs. (*Reeves* v. *Barraud*, 7 Scott, 281.)

The defendant isnone the less entitled to this charge upon the fund, because the unsuccessful disputant being insolvent, the successful one will, in all probability be unable to reimburse himself, for the diminution of the fund, from the insolvent (*Pitchers* v. *Edney*, 4 B. N. C. 721); and it is submitted that in such a case, if the fund were insufficient, the defendant would be entitled to get the amount by which it was deficient from the successful party. However, if the defendant has been offered an indemnity from either the plaintiff or the claimant, and he has refused it, he will not get his costs of interpleader

proceedings afterwards instituted by him. (*Gladstone* v. *White*, 1 Hodges, 386.) See too *Jones* v. *Regan* (9 Dowl. 580), where as the defendant, who was sued by both claimants had refused an indemnity, he was held to be not entitled to any costs, save those in the *action* brought by the unsuccessful party.

It need hardly be mentioned that the unsuccessful disputant has to bear not only the defendant's costs but the successful party's, as well as his own. This is so whether the latter succeeds in the issue, or otherwise, as by his opponent abandoning his claim (*Cusel* v. *Pariente*, 7 M. & G. 527), and in whatever character that opponent appears. (*Melville* v. *Smark*, 3 M. & G. 57.)

So far, it has been assumed that all the parties appear. It may, however, happen that either the plaintiff or the claimant do not appear. In the case of the plaintiff not appearing, it would seem, from the analogous case of an execution creditor not appearing (see *post*, p. 76), that the defendant and the claimant would each have to pay their own trifling costs, the action be stayed, and the subject-matter of litigation handed over to the claimant.

In the event of the claimant not appearing, the rule is that the defendant and the plaintiff each pay their own costs, and the fund, or subject-matter in dispute, is handed over to the plaintiff: *Lambert* v. *Cooper*, 5 Dowl. 547; *Murdoch* v. *Taylor* (8 Scott, 604: 6 B. N. C. 293). This rule certainly does seem to involve the illogical result that it depends on the act of a third party (his own conduct being the same) whether the defendant gets his costs, or not.

It seems too that in this latter case, the defendant would have to pay the costs of the action against him, so

far as it had proceeded. (*Murdoch* v. *Taylor*, and *Lambert* v. *Cooper*, *ubi supra*.) As to what constitutes an appearance of such a nature as to subject a party to liability for costs, see *Glazebrook* v. *Pickford* (2 D. N. S. 248 : 10 M. & W. 279), where it was held that appearance merely for the purpose of objecting to irregularity of procedure, and not for the purpose of litigating claims, was *not* an appearance attended with these consequences. See too *Rooda* v. *Gun & Shot, &c. Company* (28 L. T. N. S. 635, Q. B.), where the claimant was held to have appeared sufficiently to warrant his being ordered to pay the costs.

Apportionment of costs, when both parties partially succeed.

Upon the trial of the issue, it may happen that the parties are both partially successful and partially unsuccessful, and the principle adopted in these cases is to apportion the costs of the two parties, according to the amounts in respect of which each succeeded. This principle seems to have been first adopted in the case of *Dixon* v. *Yates* (5 B. & A. 313; see the form of final order in this case at p. 347).

If necessary, too, the Courts will, for the purpose of adjusting the costs justly, order the issues to be distributed. (*Staley* v. *Bedwell*, 10 Ad. & Ell. 145.) In *Carr* v. *Edwards* (8 Dowl. 29), where the fund in dispute was £182, of which the plaintiff only recovered £50, it was held that the Judge at Chambers had exercised a wise discretion, in ordering each side to pay its own costs. And it seems, that in these cases, where neither party is wholly successful, but both are partially so, *there will not, as a rule, be any general costs of the cause given.* For this, the authorities are *Lewis* v. *Holding* (2 M. & G. 875), on this point, overruling *Staley* v. *Bedwell*; and *Clifton* v. *Davis* (25 L. J. Q. B. 344 : 6 Ell. & Bl. 392).

In the case of *Lewis* v. *Holding*, where the sheriff seized five horses, and on the trial of the issue, it was found that two of them belonged to the claimant, Tindal, C. J., says, "I cannot consider this case as in the nature of an action of trover, in which, by the strict rule of law founded upon the Statute of Gloucester, the plaintiff is entitled as of right to the costs of the cause, if he succeeds as to any part of it. I cannot think that costs under the Interpleader Act were meant to be subjected to so rigorous a rule. I think that a reasonable and equitable course will be upon the finding of the jury in this case to direct that the Master should look at the bill of costs on both sides, and see how much was incurred by the claimant in making out his claim as to the two horses, and how much by the execution creditor in making out his defence as to the three, and that he should balance one set of costs against the other, and for this purpose look at the briefs and ascertain how much of the briefs and witnesses and other expenses relate to the two horses, and how much to the three. That seems to be the just and proper course to be adopted with respect to the costs of the *issue*."

In this last case, the claimant was allowed his costs of the interpleader proceedings prior to the direction of the issue, because the events proved that it was right and necessary for him to appear; but no costs subsequent to the trial were allowed him, because the claimant by claiming more than he ought, forced the execution creditor to resist his claim. (See the form of the order in this case at p. 885 of the report.)

This same rule was followed in *Clifton* v. *Davis* (also a sheriff's case), Crompton, J., saying, "The principle regulating the taxation of costs does not apply. This

case is to be treated as if there were no general costs of the cause, and as if neither party were victorious. Each is successful *pro tanto.*

If after the conclusion of the proceedings on the issue, an application for the purpose of getting the fund out of Court, or for any other purpose rendered necessary by the order directing the issue, is made, the successful party will get the costs of this application also. (*Meredith* v. *Rogers*, 7 Dowl. 596; *Barnes* v. *Bank of England*, 7 Dowl. 319.) If, however, it should so be, that there is no occasion to apply for any purpose, save to get costs, and there has been no direction originally that the parties should apply after the issue in the matter of costs, then if the unsuccessful party has not been asked to pay the costs, it has been held that he will not have to pay the successful party's costs of the application. (*Bowen* v. *Bramidge*, 2 Dowl. 213.)

Costs dealt with at termination of proceedings.

As a general rule the costs in interpleader are not dealt with until the termination of the whole matter; and are not determined on interlocutory proceedings. (*Hood* v. *Bradbury*, 6 M. & G. 981.)

PRACTICE IN SHERIFF'S INTERPLEADER.

Practice when sheriff interpleads. 1 & 2 Wm. IV. c. 58, § 5.

The main statutory provisions are:—

1 & 2 Wm. IV. c. 58, § 5, by which it is enacted that "when any such claim shall be made to any goods or chattels taken or intended to be taken in execution under any process, or to the proceeds or value thereof, it shall and may be lawful to and for the Court from which such process issued, upon application of such sheriff or other officer, to call before them by rule of Court as well the party issuing such process as the party making such

claim, and thereupon to exercise for the adjustment of such claims and the relief and protection of the sheriff or other officer all or any of the powers and authorities hereinbefore contained,* and make such rules and decisions as shall appear to be just, according to the circumstances of the case: and the costs of all such proceedings shall be in the discretion of the Court."

1 & 2 Vict. c. 45, § 2.

By 1 & 2 Vict. c. 45, § 2, a judge was given the power to deal with sheriff's interpleader, as well as the Court, and consequently from this time, all interpleader proceedings were practically commenced at Chambers.

C. L. P. Act, 1860, § 13.

By the C. L. P. Act, 1860, § 13, it is enacted that "when goods or chattels have been seized in execution by a sheriff or other officer under process of the above mentioned Courts, and some third person claims to be entitled under a bill of sale or otherwise to such goods or chattels by way of security for a debt, the Court or a Judge may order a sale of the whole or part of the secured debt, or otherwise as they or he shall think fit and may direct the application of the proceeds of such sale in such manner and upon such terms as to such Court or Judge may seem just."

§§ 14, 15, 16, 17, 18.

§§ 14, 15, 16, 17, and 18 of the Act (see them fully set out *post*, pp. 113, 114), also regulate the procedure in sheriff's interpleader.

The sheriff, therefore, on receiving notice of the claimant's claim, to the goods seized or intended to be seized, or their proceeds if sold, should give notice to the execution creditor of his intention to apply for relief, and promptly proceed to make his application. He has a

* "The powers and authorities hereinbefore contained" are the provisions of § 1 and § 3 of the Act.

right of applying to the Court, or at Chambers, but practically the application as in the case of ordinary interpleader, is now made universally at Chambers, and by summons, and that summons too, a Master's summons, since the Rules of Court of November, 1878. (See *ante*, pp. 41, 42.)

Summons. This summons is taken out in the action in which the execution creditor is plaintiff, and it calls upon the execution creditor and the claimant or claimants, to appear at Chambers at the date and time mentioned, and there show cause why they should not state the nature of their claims, &c. (See form of summons, *post*, in Appendix B, form 1, p. 125.)

Service of summons. This summons must be duly served on the parties called upon to appear, or else no order can be made against them. In *Lambert* v. *Townsend* (1 L. J. Ex. N. S. 113), it was held that service of the rule, on the claimant's wife and two attempts at service on himself were insufficient; and in *Phillips* v. *Spry* (1 L. J. Ex. N. S. 115), it was held that a service of the rule on the agent of the execution creditor's attorney was a good service. The affidavit of the sheriff, on the hearing of the rule or summons, should contain an allegation of service thereof on the parties.

On the return of the summons the sheriff must support his application by an affidavit stating that he has seized the goods, and has received notice of the adverse claim. (See form of affidavit, *post*, in Appendix B, form 2, p. 126.)

He need not deny collusion in this affidavit. (*Dobbins* v. *Green*, 2 Dowl. 509.)

If he has been guilty of any delay in his application, he must explain this in his affidavit, in the first instance,

for the Court has held that a supplemental affidavit explaining the delay will not be allowed. (*Cook* v. *Allen*, 2 Dowl. 11.)

Hearing of summons.

On the hearing of the summons, neither execution creditor nor claimant may appear; either one may appear, and not the other; both may appear.

In the event of neither of them appearing, an order may be made to sell so much of the goods as will satisfy the sheriff's poundage and expenses, and that thereupon the rest of the goods be abandoned. (*Eveleigh* v. *Salisbury*, 3 B. N. C. 298: 5 Dowl. 369.)

If the execution creditor appear, but the claimant do not, the latter is barred as against the sheriff, saving his right as against the execution creditor. (*Perkins* v. *Burton*, 2 Dowl. 108: 3 Tyr. 51; *Bowlden* v. *Smith*, 1 Dowl. 417.) If the execution creditor do not appear and the claimant does, the former cannot be barred, there being no provisions in the Act either directly or impliedly authorizing the Court or Judge to bar an execution creditor; but in *Doble* v. *Cummins* (7 Ad. & Ell. 580), where the case occurred, the Court made an order that the sheriff should withdraw from possession, and that no proceedings should be taken against him by the execution creditor "in respect of the seizure of the goods now claimed." See too *Donninger* v. *Hinxman* (2 Dowl. 424).

If the execution creditor do not appear, the executions being void, but the claimants if more than one do, then the question will be settled between the two claimants who have appeared. (*Gethin* v. *Wilks*, 2 Dowl. 189.)

If the execution creditor finds that there are no goods liable to his execution, or determines to relinquish his right, his proper course is not to appear at all. If such

being his position, he yet does appear, he will have to pay his own costs. (*Glazier* v. *Cooke*, 5 N. & M. 680.)

If, however, both parties appear, then although it is not necessary that the execution creditor should support his case with an affidavit (*Angus* v. *Wootton*, 3 M. & W. 310), as indeed his position is plain enough, yet the claimant must be prepared with one (*Powell* v. *Lock*, 3 Ad. & Ell. 315), which need not necessarily be his own. (*Webster* v. *Delafield*, 18 L. J. C. P. 187.)

No one can be heard upon the rule or summons, unless he has been called upon to appear, although he be in fact a claimant, and if certain persons have been called upon to appear in one character, they cannot appear in another.

Thus in *Clarke* v. *Lord* (2 Dowl. 55), a mortgagee appeared as a claimant, on the hearing of a rule obtained by a sheriff, without having been called on. It was held that he could not be heard; and it was also held that assignees under a fiat in bankruptcy who *had* been called on, need not and should not have appeared if the bankruptcy is put an end to, before the hearing of the rule.

However, in *Ibbitson* v. *Chandler* (9 Dowl. 250), where the sheriff's rule called upon the provisional assignee to appear, and the assignees who had subsequently been appointed, appeared, it was held that they were entitled to be heard.

New claimant.

When the practice was to apply to the Court for a rule, the defendant in ordinary interpleader (*Walker* v. *Kerr*, 12 L. J. Ex. N. S. 204), and the sheriff, in sheriff's interpleader had the power on a new claimant appearing to make him a party to the rule, and get the rule enlarged for this purpose. In applications to the Court, this could still be done; but in applications at Chambers by

summons, an adjournment of the summons if necessary, to enable the new claimant to appear prepared, should probably be obtained.

Enlargement of time to return writ.

As to the different courses open to the Judge or Master to take, it must be remembered that one course always open, is, while refusing the application of the sheriff, to give him time to return the writ of *fi. fa.*; in fact to leave him to perform the duty cast upon him by the law in the best manner he can. (*Rex* v. *Sheriff of Hertfordshire*, 5 Dowl. 144: 2 H. & W. 122, S. C.)

The order in this case, not being a final one, could, it is submitted, be appealed against by the sheriff, or either of the other parties.

Summary determination.

As to a summary determination of the matter, it may be effected, under exactly the same circumstances, and upon the same grounds as in the case of ordinary interpleader, both in respect of the circumstances, when the consent of both parties, or of one, or of neither is required, and the circumstances under which a Master has or has not jurisdiction, and in all other respects. (See *ante*, pp. 45, 46.)

Of course in this case too, the summary determination is final.

Determination of matter under § 13 of C. L. P. Act, 1860.

Another *quasi* summary method of dealing with the matter is afforded by means of the provisions of § 13 of the C. L. P. Act, 1860 (see it set out *ante*, p. 74), which enabled the Court or Judge (and now therefore the Master or District Registrar), when the claimant claimed the goods under a bill of sale, or otherwise by way of security for a debt, to order a sale of the whole or part of the goods upon such terms as to the payment of the secured debt, and the application of the proceeds as

the Court or Judge thinks fit. (For a form of order in this case see Appendix B, form 11, p. 130.)

With respect to this course of proceeding, it has been well remarked by a recent author,* "that this provision is an exceedingly beneficial one, and that if the judgment creditor cannot question the claimant's title, or where he claims under a bill of sale, cannot shew that the bill of sale is defective or satisfied, he had better consent to this order, because a bill of sale by way of mortgage may entitle the claimant to succeed upon an issue, under the ordinary orders, subjecting the judgment creditor to the payment of costs without any means of realizing the equity of redemption, excepting by bankruptcy, whereas under this order he will get the balance, if any, after the claimant is satisfied. Where the judgment creditor cannot dispute the claim, but thinks the goods may realize enough for both claims, his best course is to obtain an adjournment, and get the sheriff to value the goods."

However, it was said by Bramwell, B., in *Pearce* v. *Watkins* (2 F. & F. 377), that the sale under this section would only be ordered under special circumstances; and in that case, which was an application by the execution creditor to sell, he refused it, saying that he did not see why the claimant should not "nurse his security" if he wished.

If neither of the above-mentioned courses is adopted, the only two courses which remain are, (1) the direction of an issue, or an action between the execution creditor and the claimant, (2) the statement of a special case: for the two other courses which are open in ordinary inter- Courses 2 and 3 in ordinary in-

* Archibald's Forms of Summonses and Orders.

Interpleader inapplicable.

pleader, viz. (1) a substitution of the claimant as defendant in the action in the place of the defendant interpleading, and (2) a reference from Chambers to the Court, are here inapplicable; the first obviously from the different relations of the parties, and the second on the true construction of § 2 of 1 & 2 Vict. c. 45.

Interim disposition of subject-matter of litigation.

As both the issue or special case will necessitate considerable delay, the courses that may be adopted as to the interim disposition of the subject-matter of litigation should be here considered. The goods may at the time of the sheriff's application be either sold or unsold.

If unsold, the usual course is to require the value of them, or the amount for which execution is being levied, to be paid by the claimant into Court, or security to be given by him to the satisfaction of the Master for payment of the amount, or in default thereof, that the goods be sold, and the proceeds, deducting the expenses of sale and possession money from the date of the order, be paid into Court to abide the event.

Or an order may be made (but this is not so usual) that the sheriff do sell the goods, and pay the proceeds after deducting the expenses of sale into Court.

Or an order may be made that the sheriff do withdraw from possession upon payment of the amount of the execution into Court by the claimant or upon his giving security for the same; that in the meantime the sheriff do continue in possession, and the claimant pay possession money, unless he desires the sheriff to sell, in which case, the sheriff is to sell, and pay the money into Court after deducting expenses of sale and possession money. (See different forms of orders, *post*, in Appendix B, forms 6, 7, 8, pp. 127, 128.)

With respect to the provision that the sheriff do withdraw from possession "upon the claimant giving security for a certain amount to the satisfaction of the Master," it was held in *Darby* v. *Waterlow* (L. R. 3 C. P. 453 : 37 L. J. C. P. 203), that, as between the sheriff and the execution creditor the sheriff was justified in withdrawing on receiving information from the claimant that security had been given, pursuant to the order; this indeed was the fact, although the claimant had obtained the Master's satisfaction, by untruly saying that the sureties were approved by the execution creditor, and although the bond was, when tendered to the Master, unstamped.

If the sheriff has already sold the goods he will be directed to pay the whole amount into Court, suspending his claim to poundage, his right to which will depend upon whether the execution creditor succeeds or not. (*Barker* v. *Dynes*, 1 Dowl. 169.)

Actions, independently of interpleader proceedings.

This will be a proper place to refer to the course pursued with respect to the staying, or allowing actions to be brought independently of the interpleader proceedings. And it may be stated broadly that unless there is really a clear and distinct cause of action, such actions are looked on with great disfavour by the Courts.

By claimant against sheriff.

With respect to actions against the sheriff by the claimant, as a general rule the order directing the issue, or otherwise disposing of the matter, provides that *no* action shall be brought against the sheriff (*Carpenter* v. *Pearce*, 27 L. J. Ex. 143); and if it does so provide, of course none can be brought, and any action pending will be restrained (*Winter* v. *Bartholomew*, 25 L. J. Ex. 62), the rule being that if the sheriff has acted *bonâ fide*, and

not been guilty of any gross and culpable neglect, he shall not be subject to any action.

The cases of *Hollier* v. *Laurie* (3 C. B. 344) and *Abbott* v. *Richards* (13 M. & W. 194), in which it was held that the successful claimant might bring an action against the sheriff for trespass to the premises, though not for conversion of the goods, would not be followed, and must, it is submitted, be considered as having been overruled in the case of *Winter* v. *Bartholomew*.

By execution creditor against sheriff.

With respect to an action by the execution creditor against the sheriff, as a general rule, as the order directing the issue restrains *any* action against the sheriff, this would of course include an action by the execution creditor. Generally speaking, the circumstances would not be such as to give the execution creditor any such right of action.

However, in *Brackenbury* v. *Laurie* (3 Dowl. 180), where an issue was directed, it was made part of the order by Parke, B., that the sheriff should be discharged from all liability *except for any neglect he may have been guilty of in executing the writ, and in not appointing a deputy according to the Act:* there being grounds on which the execution creditor claimed a right against him, if by reason of them he should be defeated in the issue.

The circumstances of the case do not appear to admit of any independent action by the sheriff against either the execution creditor, or the claimant; nor does any such action by the execution creditor against the claimant seem to be practicable.

By claimant against

The only other action possible therefore is one by the claimant against the execution creditor, and the order

directing the issue, or otherwise disposing of the matter, may stay any such action. (*Carpenter* v. *Pearce*, 27 L. J. Ex. 143.) execution creditor.

However, "no action" as a rule means no action against the sheriff only. (*Hook* v. *Ind, Coope & Co.*, 36 L. T. 467.)

It would seem that if the execution creditor has merely put the sheriff in motion to levy on the goods of his judgment debtor, by means of the writ of *fi. fa.* (and this is all that the execution creditor, as a rule, does) he cannot be liable to an action at the suit of any one, and in *Woollen* v. *Wright* (31 L. J. Ex. 503), it was held that his acceptance of an issue with the claimant in no way made him liable as having *ratified* a trespass by the sheriff, and the theory that he was liable on the ground that the sheriff, as his agent, had committed a trespass, was distinctly rejected. *Walker* v. *Olding* (32 L. J. Ex. 142) is really no authority to the contrary, as there it was *assumed* that the execution creditor was liable to pay some damages, the only question being, what was the amount. As to whether the execution creditor really was in law liable at all, see the concluding remarks of the judgment of Pollock, C. B.

Lewis v. *Jones* (2 Gale, 211: 2 M. & W. 203), however, is a case in which, where the execution creditor had given *special directions* to the sheriff as to the levy, and the particular goods to be seized, the order of the Court reserved to the claimant (1) a right to sue the sheriff for the damages, if any, sustained by the claimant, by reason of the alleged negligence and misconduct of the sheriff in levying (though the claimant was expressly forbidden to sue the sheriff in trespass for the seizure); and (2) a

right to sue the execution creditor for damages sustained *by his having constituted the sheriff his agent to* levy on the goods of the claimant. The special directions in this case would seem to have created the relation of principal and agent, which, as a rule, does not exist.

Nothing more need be here said as to the frame and construction of the issue, or the proceedings on and after it till judgment signed, as these in no way differ from the like matters in ordinary interpleader, where they are fully treated. (See *ante*, pp. 48-66.)

The same observations apply to the proceedings on a special case (see *ante*, pp. 47, 48): as to which one may repeat, that it is a pity that it is not oftener resorted to in the first instance, instead of the expense and delay of an issue being incurred, on the trial of which, it is very likely that the judge will direct a special case to be stated.

Pending interpleader proceedings, no absolute right to make sheriff immediately return writ.

In *Angell* v. *Baddeley* (L. R. 3 Ex. Div. 49: 47 L. J. Ex. 86: 37 L. T. 653: 26 W. R. 137), it was held that, pending the trial of an interpleader issue, the execution creditor had no absolute right to an immediate return to the writ. "The test whether the right is absolute or not," said Brett, L. J., "is to see whether the return would be of any use to the plaintiff. I cannot see that any return the sheriff can make to the writ pending the interpleader issue can be of any use to the plaintiff; the return would be futile."

It seems too, from this case, that if the sheriff, after the usual order is made, that in default of the claimant giving security, the sheriff do sell the goods, do *not* sell the goods on default being made, but withdraw from possession, the proper course for the execution creditor to

take is to apply "to the Court or a Judge, and claim the benefit of the interpleader orders and call upon the sheriff to sell the goods" (*per* Bramwell, L. J., p. 53); and (*per* Brett, L. J.), "I am inclined to think that the sheriff might be attached for not obeying the order made at his own instance."

Jurisdiction of Court of Bankruptcy.

The London Court of Bankruptcy has the same jurisdiction in interpleader as the High Court of Justice. (*Re Buck*, 48 L. J. Bank. 33: 39 L. T. 653: W. N. 1879, 16.)

Attachment for contempt.

If a party takes any steps in violation of an interpleader order, he can be attached for contempt of Court.

Thus in *Cooper* v. *Asprey* (32 L. J. Q. B. 209 : 3 B. & S. 932), where, after service of the sheriff's interpleader summons on the claimant, the latter not only continued in possession of the goods, but proceeded to sell them, an order to attach him was made absolute. (Cf. too *Angell* v. *Baddeley*, *ubi supra*.)

Costs.

Of sheriff.

Costs in Sheriff's Interpleader. With respect to the costs of the proceedings in sheriff's interpleader, the cardinal rule with respect to the sheriff's costs, is, that he always pays his own, however proper and meritorious his conduct may have been; it being thought that the Act had conferred sufficient benefit on him by allowing him to interplead at all, and so relieve himself from a liability cast upon him by law. (*Barker* v. *Dynes*, 1 Dowl. 169; *Bryant* v. *Ikey*, 1 Dowl. 428; *Morland* v. *Chitty*, 1 Dowl. 520; *Field* v. *Cope*, 1 Dowl. 567.)

Even if the execution creditor or the claimant, fails to appear upon the rule or summons, none the less does the sheriff pay his own costs. (*Oram* v. *Sheldon*, 3 Dowl. 640;

West v. *Rotherham*, 1 Hodges, 461 ; *Beswick* v. *Thomas*, 5 Dowl. 458.) However, if there were anything vexatious in the proceedings of a claimant, he might have to pay the sheriff's costs. (*Thompson* v. *Sheddon*, 1 Scott, 697 ; *Cox* v. *Fenn*, 7 Dowl. 50.) On the other hand, the sheriff will never be ordered to pay the costs of any of the disputants, unless there has been something wrong or vexatious in his conduct. (*Morland* v. *Chitty*, 1 Dowl. 520 ; *Bland* v. *Delano*, 6 Dowl. 293.) If either the claimant or the execution creditor apply to *open* an order made, and so bring the sheriff forward again, he will get his costs for this second appearance of his (*Bryant* v. *Ikey*, 1 Dowl. 428); but if this second application is really nothing more than a prolongation before the Court of the discussion on the matter at Chambers, the sheriff will not get his costs of it. (*Tilleard* v. *Cave*, 6 B. N. C. 251.)

Where neither the claimant nor the execution creditor appeared upon the summons, the sheriff was ordered to sell so much of the goods as amounted to his poundage and expenses of sale, and to abandon the remainder of the goods seized. (*Eveleigh* v. *Salisbury*, 3 B. N. C. 298.) Where the sheriff seeks to interplead in a case, or under circumstances, in which he is not entitled to do so, and his application is refused, he will, as a rule, be ordered to pay the costs of both the other parties. (*Braine* v. *Hunt*, 2 Dowl. 391 ; *Bishop* v. *Hinxman*, 2 Dowl. 166 ; *Re Sheriff of Oxon*, 6 Dowl. 136.)

"The expenses of the execution," to which, under 43 George III. c. 46, § 5, the sheriff is entitled, does not include the costs of interpleader proceedings, but it applies only to "poundage, sheriff's fees and the like." (*Hammond* v. *Nairn*, 1 Dowl. N. S. 351.)

With respect to the expenses of the execution, the sheriff's right to his "poundage, sheriff's fees and the like," depend on the legality of the seizure. If therefore it turns out that the goods belonged to the claimant, and ought not therefore to have been seized, the sheriff will not get them. He cannot therefore retain them out of the proceeds of sale in the first instance, and he will only get them ultimately if the execution creditor succeeds. (*Barker* v. *Dynes*, 1 Dowl. 169; *Morland* v. *Chitty*, 1 Dowl. 550.)

As to "possession money," the sheriff will, as a rule, get it as from the date of his application, and not before, in any event; because if the execution creditor ultimately succeeds, then the unsuccessful party will have to pay him his expenses of keeping possession (*Scales* v. *Sargeson*, 4 Dowl. 231); if the claimant succeeds, then the execution creditor will have to pay him these expenses. (*Dabbs* v. *Humphries*, 3 Dowl. 377.) In fact, in this case, the sheriff may be regarded from the time of his application, in holding the goods, or their proceeds, if he has sold them, as *agent* for the parties. He does it, not merely in furtherance of his duties, but for the benefit of both parties. (*Underden* v. *Burgess*, 4 Dowl. 104; *West* v. *Rotherham*, 2 B. N. C. 527.) In *Gaskell* v. *Sefton* (14 M. & W. 802) it was decided that the term "possession money" did not include the cost of keeping cattle taken in execution: and so the sheriff, who in that case had been ordered to withdraw on payment of possession money, was not allowed to make an additional charge for the keep of cattle.

The sheriff is entitled to be paid the expenses which he incurs in keeping possession of the goods seized,

where he does so for the benefit of the parties, who have agreed that he shall keep in possession. (*Underden* v. *Burgess*, 4 Dowl. 104; cf. *Scales* v. *Sargeson*, 4 Dowl. 231.) The sheriff is further entitled, in the words of Williams, J., in *Armitage* v. *Foster* (1 H. & W. 208), "to the expenses he has been put to by acting in obedience to the rule of Court." (See too *Clarke* v. *Chetwode*, 4 Dowl. 635, where the sheriff was not allowed anything for keeping in possession during a period necessitated by his taking wrong proceedings which proved abortive.)

If the sheriff calls upon a *landlord* to interplead, instead of satisfying his claim to rent, if it is a valid one, he will have to pay the costs of the landlord's appearance. (*Clarke* v. *Lord*, 2 Dowl. 55.)

Of execution creditor and claimant.

With respect to the costs of the execution creditor and of the claimant or claimants, of course if they both appear, the costs of the issue, or other proceeding by which the matter is settled, will, as in ordinary interpleader, have to be paid by the unsuccessful party. (*Bragg* v. *Hopkins*, 3 Dowl. 346; *Melville* v. *Smark*, 3 Sc. N. R. 357.)

With respect to the apportionment of costs, where both the parties are partially successful, see *ante*, pp. 71-73. Where by arrangement between the execution creditor claimant and sheriff, the summons was postponed to make inquiries, and as a result of these inquiries, the execution creditor abandoned his execution, the claimant's application for his costs incurred in attending the summons was refused. (*Swaine* v. *Spencer*, 9 Dowl. 347.)

If, on the sheriff's summons, the execution creditor fails to appear, he cannot be ordered to pay the claimant's costs of appearing, and the execution creditor is not

bound to appear where he finds that there are no goods liable to his execution (*Glazier* v. *Cooke*, 5 N. & M. 680); *Beswick* v. *Thomas* (5 Dowl. 458), and *Bryant* v. *Ikey* (1 Dowl. 428), must be considered as to this, to be overruled.

If the claimant do not appear, but the execution creditor does, no costs can be given against the claimant. (*Jones* v. *Lewis*, 8 M. & W. 264; *Lambert* v. *Cooper*, 5 Dowl. 547.)

If after the direction of an issue, either the claimant or the execution creditor abandon the issue, the party thus in default will have to pay the costs of the other party up to the time of the abandonment, and also the costs of the application, if necessary, to obtain money out of court. (*Dabbs* v. *Humphries*, 1 Bing. N. C. 412: 3 Dowl. 77; *Wills* v. *Hopkins*, 3 Dowl. 346.)

In *Scales* v. *Sargeson* (3 Dowl. 707), where it was made a condition precedent to the claimant's right to have an issue that he should pay a sum into Court, it was held on his failure to do so, that he must pay the execution creditor the costs occasioned by his false claim, *and also the costs of the execution creditor's application to obtain payment of the proceeds of the sale* (but as to this last point, see *Bowen* v. *Branidge*, 2 Dowl. 213).

NOTE ON THE CHANCERY PRACTICE.

No special reference has been made to the procedure in the Chancery Division under the Interpleader Acts, nor is special reference needed, the Common Law practice being applicable in its entirety.

In the Chancery chambers, the Judge is represented by the Chief Clerk, and the summons would probably come before him in the first instance. If a party is dissatisfied with the Chief Clerk's decision, the matter is adjourned for the purpose of taking the opinion of the Judge himself in Chambers. Before an appeal can be made to the Court of Appeal from the decision of a Judge in Chambers, it is necessary that the Judge should give a certificate that he does not require to hear the matter argued before him again in Court. If a Judge does not give such a certificate, the matter must be re-argued in Court, before the appeal to the Court of Appeal.

If an issue is directed in Chancery, then subject to the right of either party to have the question of fact decided by a jury, in which case the issue would be sent down to be tried before a Common Law Judge and jury, the issue would be tried before the Judge in Court without a jury. (*McAndrew* v. *Barker*, L. R. 7 Ch. Div. 701.)

Whether the right course for a party dissatisfied with the Judge's order on the hearing is to apply to the Judge for a new trial, or to appeal from the order to the Court of Appeal, is not an easy question to answer, and can only be answered after a careful investigation of *Krehl* v. *Burrell*, L. R. 10 Ch. Div. 420; *Lowe* v. *Lowe*, L. R. 10 Ch. Div. 432; *Jones* v. *Hough*, L. R. 5 Ex. Div. 115;

and *Potter* v. *Cotton*, L. R. 5 Ex. Div. 137, from which it will appear moreover, that the matter will depend to a great extent on the manner in which the Judge treats the matter in Court.

Perhaps the fact that the parties have come to try a definite issue of fact, would bring the case within the principle of *Krehl* v. *Burrell*.

If the issue be sent down by the Chancery Division to be tried by a jury in a Common Law Division, it is an equally difficult question whether an application for a new trial should be made to the Divisional Court of which the Judge, before whom the issue was tried, is a member, or to the Judge of the Chancery Division, who directed the issue. (See the recent case of *Jenkins* v. *Morris*, L. R. 14 Ch. Div. 674.)

CHAPTER III.

INTERPLEADER IN THE COUNTY COURTS.

THE jurisdiction in interpleader given to the Courts of Common Law by 1 & 2 Wm. IV. c. 58, was found to be so great a boon to the community in general, and particularly to sheriffs in the exercise of process, that upon the establishment of County Courts in 1846 it was determined to give those Courts a power to relieve high bailiffs, analogous to the power exercised by the Superior Courts for the relief of sheriffs.

9 & 10 Vict. c. 96, § 118.

Accordingly § 118 of the Act 9 & 10 Vict. c. 96 dealt with the right and method of interpleading in the County Courts.*

* By this section it was enacted that "if any claim shall be made to or in respect of any goods or chattels taken in execution under the process of any Court holden under this Act, or in respect of the proceeds or value thereof by any landlord for rent, or any person not being the party against whom such process has issued, it shall be lawful for the clerk of the Court, upon application of the officer charged with the execution of such process as well before as after any action brought against such officer, to issue a summons calling before the said Court as well the party issuing such process as the party making such claims, and thereupon any action which shall have been brought in any of Her Majesty's Superior Courts of Record or in any local and inferior Court in respect of such claim shall be stayed, and the Court in which any such action shall have been brought, or any judge thereof, on proof of the issue of such summons, and that the

Proceedings in interpleader were regulated under this provision until 1867, when the County Courts Act, 1867 (30 & 31 Vict. c. 142), was passed. This Act repealed the 118th section of 9 & 10 Vict. c. 96: but dealt with interpleader proceedings in its 31st section; by which and the provisions of Order XXI. of the County Court Rules of 1875, the present practice is regulated.

Section 31 of the Act of 1867 provides as follows :— "If any claim shall be made to, or in respect of any goods or chattels taken in execution under the process of a County Court, or in respect of the proceeds or value thereof by any person, it shall be lawful for the Registrar of the Court upon application of the High Bailiff, as well before, as after any action brought against him, to issue a

30 & 31 Vict. c. 142, § 31.

High Bailiff may interplead where claims as to goods taken in execution are made.

goods and chattels were so taken in execution, may order the party bringing such action to pay the costs of all proceedings had upon such action after the issue of such summons out of the County Court; and the judge of the County Court shall adjudicate upon such claim and make such order between the parties in respect thereof and of the costs of the proceedings as to him shall seem fit, and such order shall be enforced in like manner as any order made in any suits brought in such Court."

It was a moot point under this section whether the County Court Judge's jurisdiction was confined to the determination of the right to the goods in dispute, or whether he could go into the question of damages for trespass in the seizure of the goods, and other consequential damage. In *Mercer* v. *Stanbury* (25 L. J. Ex. 316); *Cateff* v. *Chigwell* (15 Q. B. 217); and *Jones* v. *Williams* (4 H. & N. 704), the claimant who was successful was allowed afterwards to sue the execution creditor for damages for the trespass in the seizure of the goods. In *Foster* v. *Pritchard* (2 H. & N. 151) the successful claimant was allowed to sue the bailiff. But if the claimant were unsuccessful, even under this Act, he was not allowed subsequently to sue the bailiff for trespass (*Jessop* v. *Crawley*, 15 Q. B. 212; *Tinkler* v. *Hilder*, 4 Ex. 187), and of course he could not in such a case sue the execution creditor. As to the present law on this, see *Death* v. *Harrison* (L. R. 6 Ex. 15).]

summons calling before the said Court as well the party issuing such process as the party making such claim, and the Judge of the Court shall adjudicate upon such claim and make such order between the parties in respect thereof and of the costs of the proceedings as to him shall seem fit, and shall also adjudicate between such parties or either of them and the High Bailiff with respect to any damage or claim of or to damages arising or capable of arising out of the execution of such process by the High Bailiff, and make such order in respect thereof and of the costs of the proceedings as to him shall seem fit; and such orders shall be enforced in like manner as any order in any suit brought in such Court, and shall be final and conclusive as between the parties and as between them and either of them and the High Bailiff, unless the decision of the Court shall be in either case appealed from, and upon the issue of the summons any action which shall have been brought in any Court in respect of such claim or of any damage arising out of the execution of such process shall be stayed."

County Court Rules, 1875, Order XXI.

Order XXI. of the "County Court Rules of 1875" deals with the procedure under this 31st section, in its different rules; and by the last two rules of the order, it will be found that the right of interpleading in the County Court is extended to a defendant sued in an action brought by the assignees of a debt or chose in action.

Rule 1 of this Order provides—

[Proceedings generally.] Where any claim is made to or in respect of any goods or chattels taken in execution under the process of any County Court or in respect of the proceeds or value thereof, and summonses have been issued on the application of the bailiff, such sum-

monses shall be served in such time and mode as hereinbefore directed for an ordinary summons to appear to a plaint, and the case shall proceed as if the claimant were the plaintiff and the execution creditor the defendant; provided that where the claimant has not at the request of the bailiff made deposit in accordance with § 72 of the County Courts Act, 1856, the time of service may if the high bailiff so desires, by leave of the judge or registrar, be such time as will obtain a speedy decision on the claim.

2. [Claimant to lodge particulars and grounds of claim.] The claimant shall five clear days before the return day deliver to the bailiff or leave at the office of the registrar of the Court a particular of any goods or chattels alleged to be the property of the claimant and the grounds of his claim, or in case of a claim for rent, of the amount thereof and for what period and in respect of what premises the same is claimed to be due, and the name address and description of the claimant shall be fully set forth in such particular, and any money paid into Court under the execution shall be retained by the registrar until the claim shall have been adjudicated upon: provided that by consent of all parties, or without such consent if the judge shall so direct, an interpleader claim may be tried, although this rule has not been complied with.

3. [Claim of damage.] Where the claimant to goods taken in execution claims damages from the execution creditor or from the high bailiff for or in respect of the seizure of the goods, he shall in the particulars of his claim to the goods, state the amount he claims for damages and the grounds upon which he claims damages.

4. [Claim of damages against high bailiffs.] Where an execution creditor claims damages against a high bailiff arising out of the execution of any process he shall five clear days before the return day deliver to the high bailiff a notice of such claim stating the grounds for and amount of such claim.

5. [Payment into Court of damages claimed under 30 & 31 Vict. c. 142.] Where a claim for damages under section 31 of the County Courts Act, 1867, is made against any high bailiff and execution creditor or either of them, they or either of them may] pay into Court money in full satisfaction of such claim for damages, and such payment into Court shall be made in the same manner and have the same effect and the parties respectively shall have the same rights and remedies as by the practice of County Courts they would respectively have if the proceeding had been an action in which the claimant was plaintiff and the high bailiff and judgment creditor defendants.

6. [Interpleader Summons.] Interpleader summonses shall be issued by the registrar on the application of the bailiff without leave of the Court.

7. [Whence issued.] Interpleader summonses shall be issued from the Court of the district in which the levy was made, and the execution creditor and claimant shall be summoned to such Court.

8. [Costs where decision against claimant.] Where the claim to any goods or chattels taken in execution or the proceeds or value thereof shall be decided against the claimant, the costs of the bailiff allowed by the Judge shall be retained by him out of the amount levied, if the Judge shall not otherwise order, but without

prejudice to the right of the execution creditor against the claimant for the sum so retained.

9. [Where assignor disputes an assignment.—Form 19.] Where the defendant in an action brought by the assignee of a debt or chose in action has had notice that the assignment is disputed by the assignor or any one claiming under him, or has had notice of any other opposing or conflicting claims to such debt or chose in action, he may within five days of the service of the summons apply to the Registrar for a summons against the assignor or the person making such conflicting claim, and the Registrar shall thereupon issue an Interpleader summons according to the form in the Schedule, returnable as soon as conveniently may be; and upon the return day of such summons the Court shall hear the case of the defendant and of the plaintiff in the action, and also of the assignor disputing such assignment or of the person making such opposing and conflicting claim, and shall give such judgment therein as shall finally determine the rights and claims of all parties as if the same had been an ordinary action into which a third party had been introduced by counterclaim.

10. [Defendant in an action by assignee may pay money into Court.—Form 20.] Where a defendant in an action brought by the assignee of debt or chose in action has had notice as in the last preceding rule mentioned and thinks fit to pay the debt and costs into Court to abide its decision, he shall upon such payment into Court give to the registrar the name of the person against whose dispute of the assignment or conflicting claim he desires to be protected, and the registrar shall thereupon give notice to such person according to the

form in the Schedule, and on the return day of the summons the Judge shall determine the rights of the parties, and may, if he thinks fit, order the defendant to pay all or any part of the costs.

The course of proceedings then is as follows :—

Procedure. The Bailiff having taken the goods in execution, receives notice from the claimant of his claim to the goods.

This *need* not be in writing, nor in any particular form; but a distinct claim in writing had better be given.

If the claimant also claims damages against either the execution creditor or the Bailiff, or both of them, he had *better* include this too in his notice of claim, though possibly, having regard to the provisions of Order XXI. rule 4, the claimant need not give notice of his claim to damages till the delivery of his particulars and grounds of claim.

It may so be that the claimant is anxious that the goods taken in execution should, if still unsold, not be sold. If so, he must comply with the provisions of "The County Court Act, 1856" (19 & 20 Vict. c. 108), which, by its 72nd section, enacts that "Where any claim shall be made under section one hundred and eighteen of the Act of the ninth and tenth years of the reign of her present Majesty, chapter ninety-five, to or in respect of any goods taken in execution under the process of a County Court Judge, the claimant may deposit with the bailiff either the amount of the value of the goods claimed, such value to be fixed by appraisement, in case of dispute, to be by such Bailiff paid into Court to abide the decision of the Judge upon such claim, or the sum which the bailiff shall be allowed to charge as costs for keeping possession of such goods until such decision can be obtained,

19 & 20 Vict. c. 108, § 72.

must do so without being first requested by the bailiff. Crane v. Matthews 7 Q.B.D. 425

and in default of the claimant so doing, the Bailiff shall sell such goods as if no such claim had been made, and shall pay into Court the proceeds of such sale, to abide the decision of the Judge."

Summons. The Bailiff, on receiving notice of the claimant's claim, applies to the Registrar of the Court of the district in which the levy was made for an interpleader summons.

If the claimant has only given notice of his claim to the goods or monies taken in execution, he will be served with a summons in the form 2 in Appendix C hereto (p. 133), and the execution creditor served with a summons in the form 1.

If the claimant's claim is in respect of rent, form 3 will be the form of summons served on him.

If the claimant has given notice of his claim to *damages* as well as to the property levied on, then forms 4 and 5 will be the forms of the summonses served on the execution creditor and claimant respectively. If damages are also claimed against the Bailiff, he too will be served with a summons in form 4.

The appropriate summonses are served, as is directed by rule 1 of Order XXI.: and the effect of their issue, is as § 31 of the Act of 1867 states, to stay all actions pending in the matter.

Particulars and grounds of claim. The claimant must then, within five clear days of the hearing, deliver to the Bailiff, or leave at the office of the Registrar, the particulars of his claim and of the grounds thereof, and also particulars of the damages he claims, if any: and whether he claims such damages or not, at all events no subsequent action can be maintained in respect of them. (*Death* v. *Harrison*, L. R. 6 Ex. 15.)

Possibly the execution creditor may conceive himself to

have some claim for damages against the Bailiff in respect of neglect or laches on his part in the matter of the execution, whereby he deems himself injured. If so, he must, in accordance with rule 4, serve, five clear days before the hearing, a notice of such claim on the Bailiff. (See form 12 in Appendix C, p. 139.)

With respect to the particulars and grounds of his claim which the claimant is required to deliver five clear days before the return day, there have been several decisions, chiefly under the former County Court rules, which however, were, in this respect, practically identical with rule 2 of Order XXI. of the Rules of 1875.

In *Ex parte Tanner* (19 L. J. N. S. Q. B. 318), it was held that where the only information in the nature of particulars given by the claimant was the allegation in his notice of claim that the goods taken were, at the time of their seizure, his property, and not the property of the judgment debtor, this was insufficient, and that the County Court Judge was right in refusing to hear any evidence in support of the claim.

But in *The Queen* v. *Richards* (20 L. J. Q. B. N. S. 350), it was held that the County Court Judge was wrong in holding particulars which alleged that "the horses seized were assigned to us by an Indenture dated the 28th of March, 1850, and made between Thomas Holbrook, the defendant, of the one part, and ourselves of the other part," insufficient; and the case was remitted to him to adjudicate upon the merits.

So too in *The Queen* v. *Stapylton* (21 L. J. Q. B. 8), where the County Court Judge held that particulars (given with the notice of claim), alleging "that by a certain Indenture dated, &c., and made between the judg-

ment debtor of the one part and me of the other part, the judgment debtor granted and assigned unto me all the household goods, furniture, personal estate and effects, &c., about his houses, brewery, and premises," and claiming all such goods as aforesaid mentioned, which had been seized under the writ, were insufficient, the case was remitted to him to adjudicate upon, the particulars being deemed sufficient by the Superior Court.

In *Ex parte M'Fee* (23 L. J. Ex. 57 : 9 Ex. 361), it was held that the County Court Judge was wrong in deeming particulars insufficient because the claimant was addressed in the particulars as of 24, Elizabeth Street, Islington, whereas his true address was 20, Elizabeth Terrace, Islington.

In *Churchward* v. *Coleman* (L. R. 2 Q. B. 18) it was held that the County Court Judge was wrong in holding that the particulars and grounds of claim alleging that the goods and effects in and about the house and premises of the defendant situate at North Camp seized under a writ of execution herein are the property of the claimants the trustees appointed by a deed dated, &c. by which the judgment debtor conveyed all his estate and effects to the claimants absolutely to be administered for the benefit of all the creditors as if he had been adjudicated bankrupt, were insufficient.

In remitting this case to the County Court, the Court (dissenting in this respect from *Whitehead* v. *Proctor*, *q. v. infra*), held that it had no jurisdiction under 19 & 20 Vict. c. 108, § 43, to interfere with the County Court Judge's order as to costs.

In *Richardson* v. *Wright* (L. R. 10 Ex. 307) the Court of Exchequer were equally divided upon the question

whether the County Court Judge was right in holding that *grounds* stating that the goods were the property of the claimant, and were at the time of the seizure in his possession, were insufficient. It is submitted that the grounds of claim were amply sufficient in this case.

Payment into Court.

Where a claim is made against the execution creditor or the High Bailiff for damages, then they are empowered by rule 5 to pay money into Court: the effect of such payment is stated in the rule.

Trial.

The action then comes on in the ordinary course for hearing, and the judgment may be either for the claimant, the execution creditor, or the Bailiff, if he is a party; or against one or more of these parties. Again, the claimant may succeed as to the goods, but not as to the damages, or *vice versâ*. Or money may be paid into Court, in respect of the damage claimed, and may be sufficient or insufficient.

Possible judgments.

According as any one of these possible events occur, such will be the form of the judgment. (See the forms 6, 7, 8, 9, 10, 11, 13, 14, 15, 16, and 17, *post*, in Appendix C.)

It would seem (*Besyick* v. *Boffey*, 9 Ex. 315: 23 L. J. Ex. 83) that it is not the right course for the County Court Judge to decline to go into the merits merely on the ground that the particulars and grounds of claim are not as full or explicit as they should be, or because they have not been delivered in time. "If the particulars," said Martin, B., "have not been delivered in time, and the opposite party insists upon having five days' notice, a new summons must issue, and the real merits be adjudicated upon, when all the preliminary matters have been complied with; and the Judge has a discretion as to giving costs, like a Judge at Chambers. Indeed it would be

absurd to say that through a mere mistake in not properly setting out the particulars of claim, the goods of one person are to be taken to pay the debt of another."

In *Whitehead* v. *Procter* (3 H. & N. 532) the Court remitted the matter to the County Court Judge for re-hearing, where on the grounds of insufficient particulars he had refused to decide the question on the merits, but decided summarily against the claimant.

Rule 2, it will be observed, too, provides that with the consent of the parties, or without such consent if the Judge shall so direct, the claim may be tried, although all the provisions of the rule have not been complied with.

Costs.

As to costs, see rule 8. Subject to this they are by § 31 of the Act of 1867, in the discretion of the Judge: as a rule the unsuccessful party has to pay all the costs, the Bailiff (in this respect differing from the Sheriff in interpleader proceedings in the Superior Courts) getting his primarily out of the fund in dispute if in his hands.

If the Bailiff do *not* however retain his costs out of the amount levied, then he cannot, if the claimant has been ordered to pay the costs, sue the execution creditor for them. (*Blore* v. *Houston*, 15 C. B. 266.) Execution for costs can be had against the party ordered to pay them. (See form 18 in Appendix C, p. 143.)

Appeal.

A right of appeal (which did not originally exist) from the County Court Judge's decision was given by 19 & 20 Vict. c. 108, § 68, which gave it where the money claimed, or the value of the goods or chattels claimed, or of the proceeds thereof exceeds £20, and also in all cases where the parties agree that the Court shall have jurisdiction.

Where the value of the goods, or their proceeds if

realized, and the amount claimed does *not* exceed £20, then no appeal lies save by consent of the County Court Judge: 30 & 31 Vict. c. 142, § 13.

Interpleader proceedings cannot be removed into the High Court by *certiorari*. (*Ex parte Summers*, 18 Jur. 522.)

A word may be added as to the proceedings when a defendant, sued by the assignee of a debt or chose in action, interpleads, under rules 9 and 10.

If the defendant is not only harassed by the conflicting claims, but disputes his liability *in toto*, he proceeds under rule 9, and a summons in form 19, Appendix C., is issued and served on the assignor.

If the defendant does not dispute his liability, but only wishes to get a good discharge for payment of his debt, he proceeds under rule 10, pays the amount due, and costs up to that date into Court, and a summons in form 20 in Appendix C, is issued and served on the assignor.

In the first case, at the hearing the questions of (*a*) liability or no liability? and (*β*) if liable, to whom? will be gone into between the plaintiff, defendant, and assignor, and any counterclaim which the defendant may have against the plaintiff will also be gone into. An order will be made according to the result.

(See forms 21, 22 and 23 in Appendix C.)

In the latter case, the question whether the assignor or assignee is entitled to the debt or chose in action, will be the only one gone into at the hearing.

1 & 2 WILL. IV. c. 58.

An Act to enable Courts of Law to give relief against adverse claims made upon persons having no interest in the subject of such claims. [20th *October*, 1831.]

WHEREAS it often happens that a person sued at law for the recovery of money or goods wherein he has no interest, and which are also claimed of him by some third party, has no means of relieving himself from such adverse claims but by a suit in equity against the plaintiff and such third person, usually called a bill of interpleader, which is attended with expense and delay; for remedy thereof be it enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal and Commons in this present Parliament assembled, and by the authority of the same, that upon application made by or on the behalf of any defendant sued in any of his Majesty's Courts of Law at Westminster, or in the Court of Common Pleas of the County Palatine of Lancaster, or the Court of Pleas of the County Palatine of Durham, in any action of assumpsit, debt, detinue or trover, such application being made after declaration, and before plea, by affidavit or otherwise, shewing that such defendant does not claim any interest in the subject-matter of the suit, but that the right thereto is claimed or supposed to belong to some third party who

Upon application by a defendant in an action of assumpsit, etc., stating that the right in the subject-matter is in a third party, the Court may order such third party to appear

and maintain or relinquish his claim, and in the meantime stay proceedings in such action.

has sued or is expected to sue for the same, and that such defendant does not in any manner collude with such third party, but is ready to bring into Court or to pay or dispose of the subject-matter of the action in such manner as the Court (or any judge thereof) may order or direct, it shall be lawful for the Court, or any judge thereof, to make rules and orders calling upon such third party to appear and to state the nature and particulars of his claim, and maintain or relinquish his claim, and upon such rule or order to hear the allegations as well of such third party as of the plaintiff, and in the meantime to stay the proceedings in such action, and finally to order such third party to make himself defendant in the same or some other action, or to proceed to trial on one or more feigned issue or issues, and also to direct which of the parties shall be plaintiff or defendant on such trial, or with the consent of the plaintiff and such third party, their counsel or attornies, to dispose of the merits of their claims and determine the same in a summary manner, and to make such other rules and orders therein, as to costs and all other matters, as may appear to be just and reasonable.

Judgment and decision to be final.

§ 2. And be it further enacted, that the judgment in any such action or issue as may be directed by the Court or judge, and the decision of the Court or judge in a summary manner, shall be final and conclusive against the parties, and all persons claiming by, from, or under them.

If such third party shall not appear, &c., the Court may

§ 3. And be it further enacted, that if such third party shall not appear upon such rule or order to maintain or relinquish his claim, being duly served therewith, or shall neglect or refuse to comply with any rule or order to be

made after appearance, it shall be lawful for the Court or judge to declare such third party, and all persons claiming by, from, or under him, to be for ever barred from prosecuting his claim against the original defendant, his executors or administrators; saving nevertheless the right or claim of such third party against the plaintiff; and thereupon to make such order between the defendant and the plaintiff, as to costs and other matters, as may appear just and reasonable.

bar his claim against the original defendant.

§ 4. Provided always, and be it further enacted, that no order shall be made in pursuance of this Act by a single judge of the Court of Pleas of the said County Palatine of Durham who shall not also be a judge of one of the said Courts at Westminster, and that every order to be made in pursuance of this act by a single judge not sitting in open Court shall be liable to be rescinded or altered by the Court in like manner as other orders made by a single judge.

Proviso as to orders made by a single judge.

§ 5. Provided also, and be it further enacted, that if upon application to a judge, in the first instance, or in any later stage of the proceedings, he shall think the matter more fit for the decision of the Court, it shall be lawful for him to refer the matter to the Court; and thereupon the Court shall and may hear and dispose of the same in the same manner as if the proceeding had originally commenced by rule of Court, instead of the order of a judge.

If a judge thinks the matter more fit for the decision of the Court, he may refer it.

§ 6. And whereas difficulties sometimes arise in the execution of process against goods and chattels, issued by or under the authority of the said Courts, by reason of claims made to such goods and chattels by assignees of bankrupts and other persons, not being the parties

For relief of sheriffs and other officers in execution of process against

goods and chattels.

against whom such process has issued, whereby sheriffs and other officers are exposed to the hazard and expense of actions; and it is reasonable to afford relief and protection in such cases to such sheriffs and other officers; be it therefore further enacted, that when any such claim shall be made to any goods or chattels taken or intended to be taken in execution under any process, or to the proceeds or value thereof, it shall and may be lawful to and for the Court from which such process issued, upon application of such sheriff or other officer, made before or after the return of such process, as well before as after any action brought against such sheriff or other officer, to call before them, by rule of Court, as well the party issuing such process as the party making such claim, and thereupon to exercise, for the adjustment of such claims and the relief and protection of the sheriff or other officer, all or any of the powers and authorities hereinbefore contained, and make such rules and decisions as shall appear to be just, according to the circumstances of the case: and the costs of all such proceedings shall be in the discretion of the Court.

Rules, orders, &c., made in pursuance of this Act may be entered of record, and made evidence.

§ 7. And be it further enacted, that all rules, orders, matters and decisions to be made and done in pursuance of this Act, except only the affidavits to be filed, may, together with the declaration in the cause (if any), be entered of record, with a note in the margin expressing the true date of such entry, to the end that the same may be evidence in future times, if required, and to secure and enforce the payment of costs directed by such order; and every such rule or order so entered shall have the force and effect of a judgment, except only as to becoming a charge on any lands, tenements, or heredi-

taments; and in case any costs shall not be paid within fifteen days after notice of the taxation and amount thereof given to the party ordered to pay the same, his agent or attorney, execution may issue for the same by *fieri facias* or *capias ad satisfaciendum*, adapted to the case, together with the costs of such entry, and of the execution, if by *fieri facias;* and such writ and writs may bear teste on the day of issuing the same, whether in term or vacation; and the sheriff or other officer executing any such writ shall be entitled to the same fees, and no more, as upon any similar writ grounded upon a judgment of the Court.

Costs.

Writs.

Sheriff's fees.

§ 8. And whereas by a certain Act made and passed in the last session of Parliament, intituled "An Act to improve the Proceedings in Prohibition and on Writs on Mandamus," it was among other things enacted, that it should be lawful for the Court to which application may be made for any such writ of mandamus as is therein in that behalf mentioned, to make rules and orders calling not only upon the person to whom such writ may be required to be issued, but also all and every other person having or claiming any right or interest, in or to the matter of such writ, to shew cause against the issuing of such writ and payment of the costs of the application, and upon the appearance of such other person in compliance with such rules, or, in default of appearance after service thereof, to exercise all such powers and authorities, and to make all such rules and orders applicable to the case, as were or might be given or mentioned by or in the Act passed during that present session of Parliament for giving relief against adverse claims made upon persons having no interest in the subject of such claims; and

Upon any application under 1 Wm. IV. c. 21, and this Act, the Court to exercise such powers and make such rules as are given by or mentioned in this Act.

whereas no such Act was passed during the then present session of Parliament, be it therefore enacted, that upon any such application as is in the said Act and hereinbefore mentioned, it shall be lawful for the Court to exercise all such powers and authorities, and make all such rules and orders applicable to the case, as are given or mentioned by or in this present Act.

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1 & 2 VICT. c. 45.

An Act (inter alia) to extend the Jurisdiction of the Judges of the Superior Courts of Common Law.

Any judge may exercise such powers for the relief of sheriffs, &c., as may by virtue of 1 & 2 Wm. IV. c. 58, § 6, be exercised by the several courts.

§ 2. Whereas by another Act passed in the second year of the reign of his late Majesty King William the Fourth, intituled "An Act to enable the Courts of Law to give relief against adverse claims made upon persons having no interest in the subject of such claims," provision is made for the relief of sheriffs and other officers concerned in the execution of process issued out of any of his Majesty's Courts of Law at Westminster or of the Court of Common Pleas of the County Palatine of Lancaster, or the Court of Pleas of the County Palatine of Durham, against goods and chattels by reason of claims made to such goods and chattels, but such relief can only be given by rule of Court: and whereas it is expedient that a single judge should possess the power of giving relief in that respect, be it further enacted that it shall be lawful for any judge of the said Courts of Queen's Bench, Common Pleas, or Exchequer, with respect to any such process issued out of any of those Courts, or for any judge of the said Court of Common

Pleas of the County Palatine of Lancaster or Court of Pleas of the County Palatine of Durham (being also a judge of one of the said three Superior Courts), with respect to process issued out of the said Courts of Lancaster and Durham respectively, to exercise such powers and authorities for the relief and protection of the sheriff or other officer as may by virtue of the said last-mentioned Act be exercised by the said several Courts respectively, and to make such order therein as shall appear to be just, and the costs of such proceedings shall be in the discretion of such judge.

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8 & 9 VICT. c. 109.

An Act to amend the Law concerning Games and Wagers.

§ 19. And whereas many important questions are now tried in the form of feigned issues, by stating that a wager was laid between two parties interested in respectively maintaining the affirmative and the negative of certain propositions, but such questions may be as satisfactorily tried without such form, be it therefore enacted, that in every case where any court of law or equity may desire to have any question of fact decided by a jury, it shall be lawful for such Court to direct a writ of summons to be sued out, by such person or persons as such Court shall think ought to be defendant or defendants therein, in the form set forth in the second schedule to this Act annexed, with such alterations or additions as such Court may think proper: and thereupon all the proceedings shall go on and be brought to a close in the same manner as is now practised in proceedings under a feigned issue.

Proceedings under feigned issue abolished.

SCHEDULE 2.

In the Court of Queen's Bench ["Common Pleas" *or* "Exchequer," or in any inferior court, as the case may be].

Middlesex to wit (or such other county as may be directed).

Whereas A. B. affirms and C. D. denies (here state fully the fact or facts in issue), and the Lord Chancellor (for such other court, &c.) is desirous of ascertaining the truth by the verdict of a jury, and both parties pray that the same may be inquired of by the country: Now let a jury, &c.

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23 & 24 VICT. c. 126 (C. L. P. ACT, 1860).

Inter-pleader may be granted, though titles have not a common origin.

§ 12. Where an action has been commenced in respect of a common law claim for the recovery of money or goods, or where goods or chattels have been taken or are intended to be taken in execution under process issued from any one of the Superior Courts, or from the Court of Common Pleas at Lancaster or the Court of Pleas at Durham, and the defendant in such action or the sheriff or other officer has applied for relief under the provisions of an Act made and passed in the session of Parliament held in the first and second year of the reign of his late Majesty King William the Fourth, intituled "An Act to enable Courts of Law to give relief against adverse claims made upon persons having no interest in the subject of such claim," it shall be lawful for the Court or a judge to whom such application is made, to exercise all the powers and authorities given to them by this Act and the hereinbefore mentioned Act passed in the session of

1 & 2 Wm. IV. c. 58.

Parliament held in the first and second years of the reign of his late Majesty King William the Fourth, though the titles of the claimants to the money, goods or chattels in question, or to the proceeds or value thereof, have not a common origin, but are adverse to and independent of one another.

Court or judge may direct sale of goods seized in execution.

§ 13. When goods or chattels have been seized in execution by a sheriff or other officer under process of the above-mentioned Courts, and some third person claims to be entitled under a bill of sale or otherwise to such goods or chattels, by way of a security for a debt, the court or a judge may order a sale of the whole or part thereof, upon such terms as to payment of the whole or part of the secured debt or otherwise as they or he shall think fit, and may direct the application of the proceeds of such sale in such manner and upon such terms as to such Court or Judge may seem just.

Power to Court or judge to decide summarily in certain cases.

§ 14. Upon the hearing of any rule or order calling upon persons to appear and state the nature and particulars of their claims, it shall be lawful for the Court or Judge wherever, from the smallness of the amount in dispute or of the value of the goods seized, it shall appear to them or him desirable and right so to do at the request of either party, to dispose of the merits of the respective claims of such parties, and to determine the same in a summary manner, upon such terms as they or he shall think fit to impose, and to make such other rules and orders therein as to costs and all other matters as may be just.

Special case may be stated where facts

§ 15. In all cases of interpleader proceedings where the question is one of law, and the facts are not in dispute, the judge shall be at liberty, at his discretion, to

undisputed.

decide the question without directing an action or issue, and, if he shall think it desirable, to order that a special case be stated for the opinion of the Court.

Proceedings on special case in Court below and in error.

§ 16. The proceedings upon such case shall, as nearly as may be, be the same as upon a special case stated under "The C. L. P. Act, 1852;" and error may be brought upon such case; and the provisions of "The C. L. P. Act, 1854," as to bringing error upon a special case, shall apply to the proceedings in error upon a special case under this Act.

Judgment and decision when to be final.

§ 17. The judgment in any such action or issue as may be directed by the Court or Judge in any interpleader proceedings, and the decision of the Court or Judge in a summary manner, shall be final and conclusive against the parties and all persons claiming by, from, or under them.

Rules, orders, &c., made in interpleader proceedings may be entered of record and made evidence.

§ 18. All rules, orders, matters, and decisions to be made and done in interpleader proceedings under this Act (excepting only any affidavits) may, together with the declaration in the cause, if any, be entered of record, with a note in the margin expressing the true date of such entry, to the end that the same may be evidence in future times, if required, and to secure and enforce the payment of costs directed by any such rule or order; and every such rule or order so entered shall have the force and effect of a judgment in the Superior Courts of Common Law.

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36 & 37 Vict. c. 66 (S. C. J. Act, 1873.)

Assignment of debts and choses in action.

§ 25. Subsect. 6. Any absolute assignment, by writing under the hand of the assignor (not purporting to be by way of charge only), of any debt or other legal chose in

action, of which express notice in writing shall have been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be and be deemed to have been effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed), to pass and transfer the legal right to such debt and chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor: Provided always, that if the debtor, trustee, or other person liable in respect of such debt or chose in action shall have had notice that such assignment is disputed by the assignor or anyone claiming under him, or of any other opposing and conflicting claims to such debt or chose in action, he shall be entitled, if he think fit, to call upon the several persons making claim thereto to interplead concerning the same, or he may, if he think fit, pay the same into the High Court of Justice under and in conformity with the provisions of the Acts for the relief of trustees.

RULES OF S. C. 1875.

Order I. Rule 2. With respect to interpleader, the procedure and practice now used by Courts of Common Law under the Interpleader Acts, 1 & 2 Will. IV. c. 58, and 23 & 24 Vict. c. 126, shall apply to all actions and all the divisions of the High Court of Justice, and the application by a defendant shall be made at any time after being served with a writ of summons and before delivering a defence. Interpleader procedure preserved.

APPENDIX.

APPENDIX A.

FORMS IN STAKEHOLDER'S INTERPLEADER.

FORM 1.

INTERPLEADER SUMMONS BY STAKEHOLDER.

In the High Court of Justice,
Division. 18 , No.

Between . . . . . Plaintiff,
and
. . . . . Defendant,
Claimant.

Let all parties concerned attend the Master in Chambers on day, the day of , 18 , at o'clock in the noon, on the hearing of an application on the part of that the plaintiff and the claimant appear and state the nature and particulars of their respective claims to the monies the subject matter of this action, and maintain or relinquish the same and abide by such order as may be made hereon, and that in the meantime all further proceedings be stayed.

Dated the day of , 1880.

This summons was taken out by of , solicitor for .

To *A. B.* the said plaintiff, and to *E. F.* the said claimant.

FORM 2.

DEFENDANT'S AFFIDAVIT IN SUPPORT OF HIS SUMMONS.

In the High Court of Justice,
Division, 1880, A. No. 100.
Between . . . . . Plaintiff,
and
. . . . . Defendant.

I, , of [*here insert address*], the defendant in the above action, make oath and say as follows:—

1. The writ of summons herein was issued on the day of , 1880, and was served on me on the day of 1880. I have not yet delivered a statement of defence herein.

2. The action is brought to recover .

The said* in my possession, but I claim no interest therein.

3. The right to the said subject-matter of this action has been and is claimed† by one , who‡ .

4. I do not in any manner collude with the said , or with the above-named plaintiff, but I am ready to bring into Court or to pay or dispose of the said in such manner as the Court may order or direct.

Sworn at , the day of , 1880.
Before me .
This affidavit is filed on behalf of the .

FORM 3.

AFFIDAVIT BY CLAIMANT IN SUPPORT OF HIS CLAIM.

[*Title, &c., as in form* 2.]

I, *E. F.*, of , make oath and say as follows:—

1. I have read the affidavit of the defendant sworn in this action on , and I say that the therein mentioned is my property and I claim it as such.

2. [*Here state briefly the nature of the claimant's claim to the property.*]

Sworn, [&c., *as at end of form* 2.]

* "Is" or "are."

† If claim in writing make the writing an exhibit.

‡ State expectation of suit or that he has already sued.

FORM 4.

AFFIDAVIT OF SERVICE OF SUMMONS.

In the High Court of Justice,
Division.
Between *A. B.*, Plaintiff.
and
C. D., Defendant,
and
E. F., Claimant.

I, , of , solicitor for the above named , make oath and say as follows :—

I did on the day of , 1880, before the hour of in the noon, serve the claimant *E. F.* in this action with a true copy duly stamped of the summons hereto annexed, marked A. by leaving it at the of the said *E. F.*, situate , with there. [*If the summons be served personally on the claimant, state it so.*]

Sworn, [&c., *as at end of form* 2.]

FORM 5.

ORDER DISMISSING DEFENDANT'S APPLICATION FOR INTERPLEADER.

In the High Court of Justice, 1880, A. No. 100.
Division.
, Master in Chambers.
Between *A. B.*, Plaintiff,
and
C. D., Defendant,
and
E. F., Claimant.

Upon hearing , and upon reading the affidavit of , filed the day of , 1880, and

It is ordered that the application of be dismissed * with costs to be taxed and paid by the to the .

Dated the day of , 1880.

* If the dismissal be with costs, add these words.

FORM 6.

ORDER BARRING THE CLAIMANT.

In the High Court of Justice,
Division. 1880, A. No. 100.
, Master in Chambers.
Between Plaintiff,
and
Defendant,
and
Claimant.

Upon hearing , and upon reading the affidavit of filed the day of , 1880, and

It is ordered that the claimant be barred, that no further proceedings be taken in the action by the above-named plaintiff, against the above-named defendant, that the monies [*describe subject-matter of litigation*] be paid over by the above-named defendant to the above-named plaintiff, and that the costs of this application be .

Dated the day of , 18 .

FORM 7.

ORDER SUBSTITUTING CLAIMANT AS DEFENDANT IN THE ACTION.

In the High Court of Justice,
Division. 18 , No. .
, Master in Chambers.
Between , Plaintiff,
and
Defendant,
and
Claimant.

Upon hearing , and upon reading the affidavit of , filed on the day of , 18 , and

It is ordered that the above-named claimant be substituted as defendant in this action, in lieu of the present defendant, and that the costs of this application be .

Dated the day of , 18 .

FORM 8.

ORDER DIRECTING ISSUE BETWEEN PLAINTIFF AND CLAIMANT.

(*Title as in form 7*).

Upon hearing , and upon reading the affidavit of , filed on the day of , 18 and

It is ordered that all further proceedings in this action against the defendant be stayed, and that the said plaintiff and the said [*claimant*] be restrained from proceeding against the said defendant to recover the for which this action is brought.

And it is further ordered that the said defendant do retain possession of the until further order [*or*, forthwith pay into the hands of one of the Masters of this Court the said £].

And it is further ordered that the plaintiff and the said , claimant, proceed to the trial of an issue in the High Court of Justice, in which the plaintiff shall be plaintiff, and the [*claimant*] defendant, and that the question to be tried shall be whether [*here state the question at issue*].

And it is further ordered that this issue be prepared and delivered by the plaintiff therein within from this date, and be returned by the defendant therein within days, and be tried at .

And it is further ordered that the question of costs, and all further questions, be reserved until after the trial of the said issue.

Dated the day of , 18 .

FORM 9.

ORDER SUMMARILY DETERMINING THE MATTER.

In the High Court of Justice,
Division. 18 . No. ,
, Master in Chambers.

Between Plaintiff,
and
Defendant,
and
Claimant.

The plaintiff and the claimant having requested and consented that the merits of their claims be disposed of and determined in a

summary manner, now upon hearing , and upon reading the affidavit of , filed the day of , 18 , and

It is ordered that .

And that the costs of this application be .

Dated the day of , 18 .

FORM 10.

FORM OF ISSUE.

See the form of issue in sheriff's interpleader; [*post, form* 9, *in Appendix B.*] With the slight necessary alterations, that form is equally available for an issue in stakeholder's interpleader.

FORM 11.

ORDER DIRECTING SPECIAL CASE.

[*Heading as in form 7.*]

Upon hearing , and upon reading the affidavit of , filed on the day of , 18 , and .

It is ordered that all further proceedings in this action against the defendant be stayed, and that the said , the plaintiff, and the said , the claimant, be restrained from proceeding against the said defendant to recover the for which this action is brought.

And it is further ordered that the said , the defendant, do retain possession of the until further order [*or* forthwith pay into the hands of one of the Masters of this Court the said £].

And it is further ordered that the question as to the right to the said goods [*or* monies], as between the plaintiff and the claimant, be tried by means of a special case to be agreed upon between the said plaintiff and the said claimant, such special case to be prepared by the plaintiff and submitted to the said claimant or his solicitor within days, and returned approved by the said claimant within days.

And that any question that may arise as to the form of such case be submitted to and determined by the Master sitting at Chambers.

And it is further ordered that the question of costs and all further questions be reserved until after the hearing of the said special case.

Dated the day of , 18 .

FORM 12.

FIERI FACIAS ON ORDER FOR COSTS.

In the High Court of Justice,
Division. 18 . No. .

Between . . . . . Plaintiff,
and
. . . . . Defendant,
and
. . . . . Claimant.

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, to the sheriff of , greeting: We command you that of the goods and chattels of , in your bailiwick, you cause to be made the sum of £ , for certain costs which by an order of our High Court of Justice, dated the day of , 18 , were ordered to be paid by the said to , and which have been taxed and allowed at the said sum, and interest on the said sum at the rate of £4 per centum per annum, from the day of , 18 , and that you have the said sum and interest before us in our said Court, immediately after the execution hereof, to be rendered to the said . And in what manner you shall have executed this our writ make appear to us immediately after the execution hereof. And have there then this writ.

Witness, Hugh Mc Calmont, Earl Cairns, Lord High Chancellor of Great Britain, the day of , 18 .

Levy £ , and £ for costs of execution, &c., and also interest on £ at £4 per centum per annum from the day

of , 18 , until payment, besides sheriff's poundage, officers' fees, costs of levying, and all other legal incidental expenses.

This writ was issued by , of , agent for , of , solicitor for the .

The is a , and resides at , in your bailiwick.

FORM 13.

For a form of the record, when proceedings have been entered thereon pursuant to § 7 of the Act of 1831, and § 18 of the C. L. P. Act, 1860, see Chitty's Forms, (11th Edition), p. 670.

The entry of proceedings on record under these sections is now very seldom resorted to.

APPENDIX B.

FORMS IN SHERIFF'S INTERPLEADER.

FORM 1.

SHERIFF'S INTERPLEADER SUMMONS.

In the High Court of Justice,
. Division. 18 . No. .

, Master in Chambers,

Between . . . . . Plaintiff,
and
. . . . . Defendant,
and
. . . . . Claimant.

Let all parties concerned attend the Master in Chambers on day, the day of , 18 , at o'clock in the noon, on the hearing of an application on the part of the sheriff of that the plaintiff and the claimant appear and state the nature and particulars of their respective claims to the goods and chattels seized by the above-named sheriff , under the writ of *fieri facias* issued in this action, and maintain or relinquish the same and abide by such order as may be made herein, and that in the meantime all further proceedings be stayed.

Dated the day of , 18 .

This summons was taken out by , of , solicitor for .

To [*the plaintiff*], and [*the claimant or claimants*].

FORM 2.

SHERIFF'S AFFIDAVIT IN SUPPORT OF SUMMONS.

In the High Court of Justice,
Division. 18 . No. .
Between . . . . . Plaintiff.
and
. . . . . Defendant.
. . . . . Claimant.

I, , of , officer to the sheriff of , make oath and say as follows.

1. On the day of last, I took possession of certain goods and chattels in the house of the above-named defendant, situate at , in the county of , under a writ of *fieri facias* issued out of the above-named Division of the High Court in this action, directed to the said sheriff, and commanding him to cause to be levied of the goods and chattels of the above-named defendant £ , and interest thereon, which sums the above named plaintiff had recovered in this action against the said defendant, and endorsed to levy the whole besides sheriff's poundage, officers' fees, and other expenses of execution, and also by virtue of a warrant of the said sheriff granted on the said writ and to me directed, I still remain in possession of the said goods and chattels as such sheriff's officer.

2. On the day of , I was served with a written notice, of which the following is a copy [*here copy the claimant's notice. If notice not in writing state its effect shortly but accurately.*]

3. I make this application solely on my own behalf as officer to the said sheriff, and at my own expense and for my own indemnity. Neither the said sheriff nor myself in any way collude with the said claimant or the said plaintiff.

Sworn [*&c. as in form* 2.]

FORMS 3, 4, & 5.

The Orders dismissing the sheriff's application, barring the claimant, and summarily determining the matter by consent, will be similar to forms 5, 6, and 9 in ordinary interpleader [*see these ante, in Appendix A.*], *mutatis mutandis.*

FORM 6.

ORDER DIRECTING ISSUE.

In the High Court of Justice,
Division. 18 . No. .
Master in Chambers.

Between . . . . Plaintiff.
and
. . . . Defendant.
and between
. . . . Claimant.
and the said , execution creditor, and the
sheriff of . . . . . Respondents.

Upon hearing , and upon reading the affidavit of , filed the day of , 18 , and

It is ordered that the said sheriff proceed to sell the goods seized by him under the writ of *fieri facias* issued herein, and pay the net proceeds of the sale, after deducting the expense thereof, into Court in this cause, to abide further order herein.

And it is further ordered that the parties proceed to the trial of an issue in the High Court of Justice, in which the said claimant shall be the plaintiff, and the said execution creditor shall be the defendant, and that the question to be tried shall be whether at the time of the seizure by the sheriff the goods seized were the property of the claimant as against the execution creditor.

And it is further ordered that this issue be prepared and delivered by the plaintiff therein within from this date, and be returned by the defendant therein within days, and be tried at .

And it is further ordered that the question of costs and all further questions be reserved until after the trial of the said issue, and that no action shall be brought against the said sheriff for the seizure of the said goods.

Dated the day of , 18 .

FORM 7.

ANOTHER ORDER DIRECTING ISSUE.

[*Heading as in No.* 6.]

Upon hearing , and upon reading the affidavit of , filed the day of , 18 , and

It is ordered that upon payment of the sum of £ into Court by the said claimant within from this date, or upon his giving within the same time security to the satisfaction of one of the Masters of the Supreme Court for the payment of the same amount by the said claimant, according to the directions of any order to be made herein, and upon payment to the above-named sheriff of the possession money from this date, the said sheriff do withdraw from the possession of the goods seized by him under the writ of *fieri facias* herein.

And it is further ordered that unless such payment be made or security given within the time aforesaid, the said sheriff proceed to sell the said goods, and pay the proceeds of the sale, after deducting the expenses thereof, and the possession money from this date, into Court in the cause, to abide further order herein.

And it is further ordered that the parties proceed to the trial of an issue [*&c. &c. in exactly the same terms from this point as form* 6.]

Dated the day of , 18 .

FORM 8.

ANOTHER ORDER DIRECTING AN ISSUE.

[*Heading as in form* 6.]

Upon hearing , and upon reading the affidavit of filed the day of , 18 , and

It is ordered that upon payment of the sum of £ into Court by the said claimant, or upon his giving security to the satisfaction of one of the Masters of the Supreme Court for the payment of the same amount by the claimant, according to the directions of any order to be made herein, the above-named sheriff withdraw from the possession of the goods seized by him under the writ of *fieri facias* issued herein.

And it is further ordered that in the meantime and until such

payment made or security given, the sheriff continue in possession of the goods, and the claimant pay possession money for the time he so continues, unless the claimant desire the goods to be sold by the sheriff, in which case the sheriff is to sell them, and pay the proceeds of the sale, after deducting the expenses thereof and the possession money from this date, into Court in this cause to abide further order herein.

And it is further ordered that the parties proceed to the trial of an issue, [*&c. &c. in the same terms from this point as form* 6].

Dated the day of , 18 .

FORM 9.

INTERPLEADER ISSUE.*

In the High Court of Justice,
Division.

Between . . . . . Plaintiff,
and
. . . . . Defendant.

Interpleader issue

Delivered the day of , by , solicitor for the above-named plaintiffs, pursuant to an interpleader order of [the Honourable Mr. Justice], dated .

The plaintiff, *A. B.* affirms, and the defendant, *C. D.* denies that the goods [*here describe them*] seized, on the day of , in execution by the sheriff of , under a writ of *fieri facias* tested the day of , and issued out of the Division of Her Majesty's High Court of Justice, directed to the said sheriff for the having of execution of a judgment of that Court, recovered by the said *A. B.* in an action at his suit against *M. N.* were, or some part thereof was, at the time of the said seizure, the property of the said *A. B.* as against the said *C. D.*

And it has been ordered by the Honourable Mr. Justice , [*or* by Master Smith], that the said question shall be tried by a jury, and that the said matter should be tried at .

Therefore let a jury come, &c.

* This form of issue can with slight variations be applied to the case of an issue in interpleader at the suit of an ordinary person, as well as at that of a sheriff.

FORM 10.

ORDER DIRECTING SPECIAL CASES.

[*Heading as in No.* 6.]

[*The order will first deal with the interim disposition of the property in dispute, and any one of the three courses adopted respectively in forms* 6, 7, *and* 8, *may be here adopted. The order will then proceed thus:*—]

And it is further ordered that the question as to the right to the said goods [*or* monies], as between the claimant and the plaintiff, be tried by means of a special case, to be agreed upon between the said claimant and the said plaintiff, such special case to be prepared by the claimant and submitted to the said plaintiff, within days, and returned approved by the said plaintiff within days. And that any question that may arise as to the form of such case be submitted to and determined by the Master sitting at Chambers.

And it is further ordered that the question of costs and all further questions be reserved until after the hearing of the said special case, and that no action be brought against the said sheriff for the seizure of the said goods.

Dated the day of , 18 .

FORM 11.

ORDER SUMMARILY DISPOSING THE MATTER UNDER C. L. P. ACT 1860, § 13.

[*Heading as in No.* 6.]

Upon hearing , and upon reading the affidavit of , filed the day of , 18 , and

It is ordered that the above-named sheriff proceed to sell enough of the goods seized under the writ of *fieri facias* issued in this action to satisfy the expenses of the said sale, the rent (if any) due, the claim of the claimant, and this execution.

And it is further ordered that out of the proceeds of the said sale (after deducting the expenses thereof and rent, if any) the said sheriff pay to the claimant the amount of his said claim, and

to the execution creditor the amount of his execution, and the residue, if any, to the defendant.

And it is further ordered that no action be brought against the said sheriff, and that the costs of this application be .

Dated the day of , 18 .

FORM 12.

For the *form of the record*, when the proceedings have been entered thereon pursuant to § 7 of the Act of 1831, and § 18 of the C. L. P. Act, 1860, see Chitty's Forms (11th Edition), p. 677.

FORM 13.

For the *form of an interpleader bond*, the usual security required from the claimant, when he does not wish the goods seized to be sold, and wishes the sheriff to withdraw from possession of them, see Chitty's Forms (11th Edition), p. 678.

FORM 14.

For form of a *fieri facias* for costs on an order, see *ante*, *Appendix A.* p. 123, *form* 12.

For the forms in use in the like proceedings in the Chancery Division, which are similar to, but somewhat more full than those in use at common law, see Seton on Decrees, vol. i. p. 358 (4th Edition), and Pemberton on Judgments, p. 89 (2nd Edition).

APPENDIX C.

FORMS OF PROCEEDINGS IN COUNTY COURT INTERPLEADER.

FORM 1.

INTERPLEADER SUMMONS TO EXECUTION CREDITOR.

In the County Court of , holden at .

No. of Plaint, .

Between *A. B.*, Plaintiff,
[*Address, Description,*]
and
C. D., Defendant,
[*Address, Description.*]

Whereas [*here insert the name, address, and description of claimant, so far as is then known*] hath made a claim to [certain goods and chattels [*or* monies, &c.], taken in execution under process issuing out of this Court at your instance] [*or* certain rent alleged to be due to him].

You are hereby summoned to appear at a Court to be holden at , on the day of , 18 , at the hour of in the noon, when the said claim will be adjudicated upon, and such order made thereupon as to the Judge shall seem fit.

Dated this day of , 18 .

Registrar of the Court.

To the Execution Creditor.

NOTE.—*The claimant is called upon to give the particulars of his claim, which you may inspect on application at the office of the Registrar of this Court, four days before the day of hearing.*

FORM 2.

INTERPLEADER SUMMONS TO A CLAIMANT SETTING UP A CLAIM TO THE GOODS, OR THE PROCEEDS THEREOF

[*Name, address, and description of claimant*], you are hereby summoned to appear at a Court to be holden at , on the day of , 18 , at the hour of in the noon, to support a claim made by you to certain goods and chattels [*or* monies, &c.], taken in execution under process issued in this action at the instance of [*the execution creditor*], and in default of your then establishing such claim the said goods and chattels will then be sold [*or* the said monies, &c. paid over], according to the exigency of the said process; and take notice, that you are hereby required, five days before the said day, to deliver to the officer in charge of the said process, or leave at my office, particulars of the goods and chattels which [*or* the proceeds whereof] are claimed by you, and of the grounds of your claim; and in such particulars you shall set forth fully your name, address, and description; and take notice, that in the event of your not giving such particulars as aforesaid, your claim will not be heard by the Court.

To [*the claimant above-named*].

FORM 3.

INTERPLEADER SUMMONS TO A CLAIMANT SETTING UP A CLAIM TO RENT IN RESPECT OF THE PREMISES UPON WHICH THE EXECUTION WAS LEVIED.

[*Name, address, and description*], you are hereby summoned to appear at a Court to be holden at on the , day of , 18 , at the hour of in the noon, to support a claim made by you to certain rent alleged by you to be due to you in respect of and issuing out of certain premises upon which certain goods and chattels were taken in execution under process of this Court in this action at the instance of [*the execution creditor*]; and in default of your then establishing such claim the said goods and chattels will then be sold, and the proceeds thereof paid over according to the exigency of the said process [*or*, if such goods and

chattels shall have been then sold, then the proceeds of such sale will be paid over according to the exigency of the said process]; and take notice, that you are hereby required, five days before the said day, to deliver to the officer in charge of the said process, or leave at my office, particulars of the amount of the rent claimed by you, and of the period for which and of the premises in respect of which you claim such rent, and of the grounds of your claim; and in such particulars you shall set forth fully your name, address, and description; and take notice that in the event of your not giving such particulars, your claim will not be heard by the Court.

To [*the claimant above-named*].

FORM 4.

INTERPLEADER SUMMONS TO AN EXECUTION CREDITOR AND TO THE HIGH BAILIFF, WHERE CLAIMANT CLAIMS DAMAGES AS WELL AS THE GOODS SEIZED.

[*Insert residence and description of claimant.*]

Whereas *E. F.*, of , hath made a claim to certain goods and chattels [*or* monies, &c.] taken in execution under process issuing out of this Court at your instance, and hath also claimed from you and from the High Bailiff of this Court the sum of £ , for damages arising out of the said execution:

You and the High Bailiff are therefore hereby summoned to appear at a Court to be holden at , the day of , 18 , at the hour of in the noon, when the said claim, both as to the said goods and chattels, and as to the said damages, will be adjudicated upon, and such order made thereupon as to the said Judge shall seem fit.

To the Execution Creditor, and to
the High Bailiff of this Court.

NOTE.—*The claimant is called upon to give the particulars of his claim, which you may inspect on application at the office of the Registrar of this Court, four days before the day of hearing.*

FORM 5.

INTERPLEADER SUMMONS TO A CLAIMANT SETTING UP A CLAIM TO DAMAGES, AS WELL TO THE GOODS OR THE PROCEEDS THEREOF.

[*Name, address, and description of claimant*], you are hereby summoned to appear at a Court to be holden at , on the day of , 18 , at the hour of in the noon, to support a claim made by you to certain goods and chattels [*or* monies, &c.] taken in execution under process issued in this action at the instance of [*the execution creditor*], and also for damages arising out of such execution, and, in default of your then establishing such claim, the said goods and chattels will then be sold [*or* the said monies paid over], according to the exigency of the said process; and take notice that you are hereby required, five days before the said day, to deliver to the officer in charge of the said process, or leave at my office, particulars of the goods and chattels which [*or* the proceeds whereof] are claimed by you, and of the grounds of your claim, and also of the grounds upon which you claim damages; and you must also state in such particulars the amount of the damages you claim, and the party from whom you claim the same, and in such particulars you shall set forth fully your name, address, and description; and take notice that in the event of your not giving such particulars as aforesaid your claim will not be heard by the Court.

To [*the claimant above-named*].

FORM 6.

ORDER ON AN INTERPLEADER SUMMONS WHERE THE CLAIM IS NOT ESTABLISHED.

Between *A. B.*, ... Plaintiff.
and
C. D., ... Defendant.
and
E. F., ... Claimant.

It is this day adjudged, touching the claim of *E. F.* to certain goods and chattels [*or* monies, &c.] taken in execution in this action [*or* to certain rent alleged to be due to him], that the said

goods and chattels [*or* monies, &c. or part thereof, to wit, &c. specifying them] are the property of the execution debtor [*or* that there is no rent due to the said *E. F.*].

And it is ordered that the costs of this proceeding, amounting to £ , be paid by the said *E. F.* to the registrar of this Court on or before the day of for the use of the execution creditor.

FORM 7.

ORDER ON AN INTERPLEADER SUMMONS WHERE THE CLAIM IS ESTABLISHED.

It is this day adjudged, touching the claim of *E. F.* to certain goods and chattels [*or* monies, &c.] taken in execution in this action [*or* to certain rent alleged to be due to him], that the said goods and chattels [*or* monies, &c. or part thereof, to wit, specifying them], are his property [*or* that rent to the amount of £ is due to him].

And it is ordered that the said [*execution creditor*] do pay to the registrar of this Court, for the use of the said *E. F.*, £ for costs on or before , the day of , 18 .

FORM 8.

ORDER ON AN INTERPLEADER SUMMONS WHERE BOTH GOODS AND DAMAGES ARE CLAIMED, AND THE CLAIM TO NEITHER IS ESTABLISHED.

No. of Plaint.

In the County Court of , holden at .

Between *A. B.* . . . . . Plaintiff.

and

C. D. . . . . . Defendant.

And between *E. F.* . . . . . Claimant,

and

The Execution Creditor and the High Bailiff of this Court . . . Respondents.

It is this day adjudged, touching the claim of *E. F.* to certain goods and chattels [*or* monies, &c.] taken in execution in this

action, and for damages arising out of the said execution, and which *E. F.* claims against [*the execution creditor*] and the High Bailiff of this Court, that the said goods and chattels [*or* monies, &c., or part thereof, *describe the part*] are the property of [*the execution debtor*], and that the said *E. F.* is not entitled to recover any damages from either [*the execution creditor*] or the High Bailiff of this Court:

And it is ordered that the costs of this proceeding, amounting to £ , be paid by the said *E. F.* to the registrar of this Court on or before the day of . 187 , as to £ , part thereof, for the use of the execution creditor, and as to £ , the residue thereof, for the use of the High Bailiff of this Court.

FORM 9.

ORDER ON AN INTERPLEADER SUMMONS WHERE BOTH GOODS AND DAMAGES ARE CLAIMED, AND THE CLAIM TO BOTH IS ESTABLISHED.

[*Same heading as No.* 8.]

It is this day adjudged, touching the claim of *E. F.* to certain goods and chattels [*or* monies, &c.] taken in execution in this action, and for damages arising out of the said execution, and which *E. F.* claimed against the High Bailiff of this Court, that the said goods and chattels [*or* monies, &c., or part thereof, *specifying them*] are the property of *E. F.*, and that *E. F.* is entitled to recover the sum of £ for damages arising out of the said executions against the High Bailiff of this Court.

If the claim for damages be against the execution creditor as well as against the High Bailiff, to state it.

And it is ordered that the High Bailiff of this Court do pay the said sum of £ for damages, and the sum of £ for costs, and the execution creditor the sum of £ for costs, to the registrar of this Court, for the use of the said *E. F.* on or before the day of , 18 .

To the Execution Creditor and
the High Bailiff of this Court.

FORM 10.

ORDER ON AN INTERPLEADER SUMMONS WHERE BOTH GOODS AND DAMAGES ARE CLAIMED, AND THE CLAIM TO THE GOODS IS, BUT THAT TO DAMAGES IS NOT, ESTABLISHED.

[*Same heading as No.* 8.]

It is this day adjudged, touching the claim of *E. F.* to certain goods and chattels [*or* monies, &c.] taken in execution in this action, and for damages arising out of the said execution, and which *E. F.* claims against the execution creditor and the High Bailiff of this Court, that the said goods and chattels [*or* monies, &c., or part thereof, *specifying them*] are the property of the said *E. F.*, but that the said *E. F.* is not entitled to recover any damages for either the execution creditor or the High Bailiff of this Court:

And it is ordered that the execution creditor do pay to the registrar of this Court on or before the day of , 18 , the sum of £ for costs for the use of the said *E. F.*, and that the said *E. F.* do pay to the registrar of this Court, on or before the day of , 18 , the sum of £ for costs, for the use of the High Bailiff of this Court.

To the Execution Creditor
and *E. F.* the Claimant.

FORM 11.

ORDER ON AN INTERPLEADER SUMMONS WHERE BOTH GOODS AND DAMAGES ARE CLAIMED AND THE CLAIM TO THE GOODS IS NOT, BUT THE CLAIM TO DAMAGES IS, ESTABLISHED.

[*Same heading as No.* 8.]

This may arise where the Bailiff is guilty of some wrongful act in taking property of the execution debtor out of the

It is this day adjudged, touching the claim of *E. F.* to certain goods and chattels [*or* monies, &c.] taken in execution in this action, and for damages arising out of the said execution, and which *E. F.* claims against the execution creditor and the High Bailiff of this Court, that the said goods and chattels [*or* monies, &c.] are the property of the execution debtor, and that the said *E. F.* is entitled to recover £ for damages from the High Bailiff of this Court, but not any damages from the execution creditor:

And it is ordered that the said *E. F.* do pay to the registrar of this Court on or before the day of , 18 , the sum of £

for costs, for the use of the execution creditor, and that the High Bailiff of this Court do pay to the registrar of this Court, on or before the day of , 18 , the sum of £ for costs, for the use of the said *E. F.* possession of the claimant.

To *E. F.* the Claimant and
the High Bailiff.

FORM 12.

CLAIM OF AN EXECUTION CREDITOR FOR DAMAGES FROM A HIGH BAILIFF.

Take notice that I, the execution creditor, claim the sum of £ from you, the High Bailiff of this Court, for damages arising out of a certain execution in this cause, and that the grounds of my claim are as follows: [*here state the grounds of the claim, e.g.*, for that you, having seized certain goods and chattels of and belonging to the execution debtor, under process issued from this Court at my instance, wrongfully, and without lawful excuse, withdrew from the possession of the said goods and chattels, whereby I was deprived of the fruits of the said execution.] 30 & 31 Vict. c. 142, § 31.

Dated this day of , 18 .

Execution Creditor.

To the High Bailiff
of this Court.

FORM 13.

ORDER ON AN INTERPLEADER SUMMONS BY EXECUTION CREDITOR AGAINST A HIGH BAILIFF WHERE THE CLAIM TO DAMAGES IS ESTABLISHED.

No. of Plaint.

In the County Court of , holden at .

Between *A. B.* . . . . . Plaintiff,

and

C. D. . . . . . Defendant.

And between the Execution Creditor . . Claimant,

and

The High Bailiff of this Court . . Respondent.

It is this day adjudged, touching the claim of , the execution creditor in this cause, against the High Bailiff of this Court, for

damages arising out of an execution in this cause, in which process issued from this Court at the instance of the said , the execution creditor, directing the High Bailiff to levy the sum of £ of and from the goods and chattels of [*the execution debtor*] that the said , the execution creditor, is entitled to recover from the High Bailiff of this Court the sum of £ for damages arising out of the said execution.

And it is ordered that the High Bailiff of this Court do, on or before the day of , 18 , pay to the registrar of this Court the said sum of £ , and also the further sum of £ , for costs for the use of the said , the execution creditor.

To the High Bailiff
of this Court.

FORM 14.

ORDER ON AN INTERPLEADER SUMMONS BY AN EXECUTION CREDITOR AGAINST A HIGH BAILIFF WHERE THE CLAIM TO DAMAGES IS NOT ESTABLISHED.

[*Same heading as No.* 13.]

It is this day adjudged, touching the claim of , the execution creditor in this cause, against the High Bailiff of this Court, for damages arising out of an execution in this cause, in which process issued from this Court at the instance of the said , the execution creditor, directing the said High Bailiff of this Court to levy the sum of £ of and from the goods and chattels of [*the execution debtor*], that the said , the execution creditor, is not entitled to recover from the said High Bailiff of this Court any damages in respect of or in any way arising from the said execution.

And it is ordered that the said , the execution creditor, do, on or before the day of , 18 , pay to the registrar of this Court the sum of £ for costs, for the use of the said High Bailiff of this Court.

To , the Execution
Creditor.

FORM 15.

ORDER ON INTERPLEADER SUMMONS WHERE BOTH GOODS AND DAMAGES ARE CLAIMED AND MONEY IS PAID INTO COURT IN RESPECT OF THE LATTER, AND THE CLAIM TO THE GOODS IS ESTABLISHED, AND THE MONEY PAID INTO COURT IS FOUND TO BE SUFFICIENT TO SATISFY THE DAMAGES.

[*Same heading as No.* 13.]

It is this day adjudged, touching the claim of *E. F.* to certain goods and chattels [*or* monies, &c.] taken in execution in this action, and for damages arising out of the said execution, and which *E. F.* claimed against the High Bailiff of this Court, and in respect of which damages hath paid into Court the sum of £ , that the said goods and chattels [*or* monies, &c., *or* part thereof, *specifying them or it*] are the property of *E. F.*, but that the said sum paid into Court is sufficient to satisfy all damages arising out of the said execution.

And it is ordered that the execution creditor do pay to the registrar of this Court the sum of £ for costs for the use of *E. F.*, and that *E. F.* do pay to the registrar of this Court the sum of £ for costs for the use of the High Bailiff, on or before the day of , 18 .

To , the Execution Creditor,
and to *E. F.*

FORM 16.

ORDER ON AN INTERPLEADER SUMMONS WHERE BOTH GOODS AND DAMAGES ARE CLAIMED, AND MONEY IS PAID INTO COURT IN RESPECT OF THE LATTER, AND THE CLAIM TO THE GOODS IS ESTABLISHED, AND THE MONEY PAID INTO COURT IS ADJUDGED INSUFFICIENT.

[*Same heading as No.* 13.]

It is this day adjudged, touching the claim of *E. F.* to certain goods and chattels [*or* monies, &c.] taken in execution in this action, and for damages arising out of the said execution, and which *E. F.* claims against the High Bailiff, and in respect of

which damages was paid into Court the sum of £ , that the said goods and chattels [*or* monies, &c.] are the property of the said *E. F.*, and that the said sum of £ paid into Court is not sufficient to satisfy the damages arising out of the said execution, and that the said *E. F.* is entitled to recover the further sum of £ for damages from the High Bailiff.

And it is ordered that the execution creditor do pay to the registrar of this Court, on or before the day of , 18 , the sum of £ for costs for the use of the said *E. F.* and that the High Bailiff do pay to the registrar of this Court, on or before the last-mentioned day, the said further sum of £ for damages, and also the sum of £ for costs, for the use of the said *E. F.*

To , the Execution Creditor,
and the High Bailiff.

FORM 17.

ORDER ON AN INTERPLEADER SUMMONS BY AN EXECUTION CREDITOR AGAINST A HIGH BAILIFF FOR DAMAGES, AND WHERE THE HIGH BAILIFF PAYS MONEY INTO COURT.

[*Same heading as No.* 13.]

It is this day adjudged, concerning the claim of the execution creditor in this cause against the High Bailiff of this Court for damages arising out of an execution in this cause, in which process issued from this Court at the instance of the said , the execution creditor, directing the said High Bailiff of this Court to levy the sum of £ of and from the goods and chattels of [*the execution debtor*], and in respect of which damages the High Bailff hath paid into Court the sum of £ , that the sum paid into Court is sufficient to satisfy all damages arising out of the said execution [*or* that the sum paid into Court is not sufficient to satisfy all damages arising out of the said execution, and that the said , the execution creditor, is entitled to recover the further sum of £ for damages from the High Bailiff.]

And it is ordered that the said , the execution creditor, do pay to the registrar of this Court, on or before the day of , 18 , the sum of £ for costs for the use of the High Bailiff [*or* that the High Bailiff do pay to the registrar of this Court

the said further sum of £ for damages, and also the further sum of £ for costs, for the use of , the execution creditor.]

To , the Execution Creditor [*or* to the High Bailiff of this Court.]

FORM 18.

WARRANT OF EXECUTION AGAINST THE GOODS OF CLAIMANT.

Whereas at a Court holden on the day of , 18 , , the plaintiff, recovered against the defendant the sum of £ for debt [*or* damages] and for costs:

And whereas the defendant, by an order of the Court, was ordered to pay the same to the registrar of this Court: 9 & 10 Vict. c. 95, § 118.

And whereas default having been made to the said order, an execution issued against the goods of the defendant, under which certain goods and chattels were seized, in respect of which *E. F.*, of, &c., made claim, and which claim was heard and decided upon at a Court held at , on the day of , 18 , and it was adjudged that the goods so seized under the said execution were the property of the defendant [*or* that certain rent alleged by the said *E. F.*, of, &c., to be due to him was not so due]:

And it was ordered that the costs of that proceeding, amounting to the sum of £ , should be paid by the claimant to the registrar of the said Court, on or before the day of , 18 :

And whereas default has been made in payment according to the said last-mentioned order:

These are therefore to require and order you forthwith to make and levy by distress and sale of the goods and chattels of the said claimant wheresoever they may be found within the district of this Court (excepting the wearing apparel and bedding of the said claimant or his family, and the tools and implements of his trade, if any, to the value of five pounds), the sum stated at the foot of this warrant, being the amount due to the plaintiff under the said order, including the costs of this execution, and also to seize and take any money or bank notes (whether of the Bank of England or of any other bank), and any cheques, bills of exchange, promissory notes, bonds, specialties, or securities for money, of the claimant which may there be found, or such part or so much thereof as may be sufficient to satisfy this execution, and the costs of making and executing the same, and to pay what you

shall have so levied to the registrar of this Court, and make return of what you have done under this warrant, immediately upon the execution thereof.

Given under the seal of the Court this day of , 18 .

By the Court,

Registrar of the Court.

To the High Bailiff of the said Court, and others the bailiffs thereof.

	£	s.	d.
Costs adjudged			
Poundage for issuing this warrant . .			
Total amount to be levied			

NOTICE.—The goods and chattels are not to be sold until after the end of five days next following the day on which they were seized, unless they be of a perishable nature, or at the request of the said claimant.

19 & 20 Vict. c. 108, § 46

Application was made to the registrar for this warrant at minutes past the hour of in the noon of the day of , 18 .

FORM 19.

SUMMONS WHERE A DEFENDANT SUED BY AN ASSIGNEE HAS HAD NOTICE THAT THE ASSIGNMENT IS DISPUTED BY THE ASSIGNOR.

No. of Plaint.

In the County Court of , holden at .

Between *A. B.*, Plaintiff,
[*Address, Description.*]
and
C. D., Defendant.
[*Address, Description.*]

Whereas the defendant in this action has had notice from you that you dispute the assignment of the subject matter in dispute between the plaintiff and defendant in this action [*or* that you claim the subject matter of this action]:

You are therefore summoned to appear at a Court to be holden at on the day of at the hour of in the noon, when the dispute [*or* claim] between you and the

plaintiff will be determined, and judgment be given determining the rights and claims of the plaintiff, the defendant, and yourself.

Dated this day of 188 .

To *E. F.*, of (*here insert address and description of the person to be summoned*).

FORM 20.

SUMMONS WHERE A DEFENDANT SUED BY AN ASSIGNEE HAS HAD NOTICE THAT THE ASSIGNMENT IS DISPUTED BY THE ASSIGNOR, AND HAS PAID DEBT AND COSTS INTO COURT.

(*Heading as in Form* 20.)

Whereas the defendant has had notice that you dispute the assignment of the subject matter in this action.

And whereas he has paid into Court the sum of £ , being the amount claimed by the action, and the sum of £ for costs.

This is to give you notice that you must appear at a Court to be holden on the day of at the hour of in the noon, when the Court will adjudicate.

FORM 21.

ORDER WHERE ASSIGNMENT IS INVALID.

No. of Plaint.

In the County Court of , holden at .

Between *A. B.*, Plaintiff,

C. D., Defendant,

and

E. F., made party by summons.

dated the day of .

It is this day adjudged, touching the dispute to the assignment of the subject matter of this action to the plaintiff, that there is no such assignment as alleged, and that the said *E. F.* do recover against the plaintiff the sum of £ for costs, and that the defendant do recover against the plaintiff the sum of £ for costs.

It is further adjudged that the said *E. F.* do recover against the defendant the sum of £ for debt, and the sum of £ for costs.

It is ordered that the plaintiff do pay the sum of £ , and the sum of £ to the registrar on, &c.

And it is further ordered that the defendant do pay the sum of £ to the Registrar, &c.

FORM 22.

ORDER WHERE ASSIGNMENT IS VALID.

(*Heading as in Form* 21.)

It is this day adjudged, touching the dispute to the assignment of the subject-matter of this action to the plaintiff, that the said assignment is good, and that the plaintiff do recover against *E. F.* the sum of £ for costs, and that the defendant do recover against the said *E. F.* the sum of £ for costs.

It is further adjudged that the plaintiff do recover against the defendant the sum of £ for debt, and the sum of £ for costs.

It is ordered that *E. F.* do pay the sum of £ , and the sum of £ to the registrar of the Court on the day of .

And it is further ordered that the defendant do pay the sum of £ to the Registrar on the day of [or by instalments of for every days, the first instalment to be paid on the day of 18 .]

FORM 23.

ORDER WHERE ASSIGNMENT IS INVALID, AND DEFENDANT FILES A COUNTER-CLAIM AGAINST PLAINTIFF.

(*Heading as in Form* 21.)

It is this day adjudged, touching the assignment of the subject-matter of this action to the plaintiff, that there is no such assignment as alleged, and that the counter claim of £ against the plaintiff by the defendant is sustained.

It is adjudged that the assignor do recover against the defendant the sum of £ for debt, together with the sum of £ for costs.

It is further adjudged that the defendant do recover against the plaintiff the sum of £ in respect of his counter claim, and the sum of £ for costs.

It is ordered that the defendant do pay the sum of £ together with the sum of £ to the registrar on, &c.

It is further ordered that the plaintiff do pay the sum of £ and the sum of £ to the registrar, on, &c.

ATTACHMENT OF DEBTS.

ATTACHMENT OF DEBTS.

INTRODUCTORY.

THERE was no way, previous to the passing of the Common Law Procedure Act, 1854, by means of which a judgment creditor could obtain payment of his debt, from parties who were indebted to the judgment debtor; yet far more than the amount of the judgment debt might be due to the judgment debtor from such parties: and they would probably be quite indifferent to whom they paid the debt, so long as they could get a good discharge for it.

Such being the state of things, the Common Law Procedure Act, 1854, in § 60—67, provided a machinery by means of which a judgment creditor might ascertain what debts were due to his judgment debtors from third parties, and then proceed to attach them, and so ultimately obtain payment of them. C. L. P. Act, 1854.

The practice was further developed by the Common Law Procedure Act, 1860, sections 29 & 30; and by these provisions the practice was regulated at Common Law till the passing of the Judicature Act, 1875. C. L. P. Act, 1860.

In Chancery, the power to attach debts did not exist. (*Horsley* v. *Cox*, L. R. 4 Ch. 92.)

Rules of S. C. 1875, Order 45.

Now, however, under Order 45 of the Rules of the S. C. of 1875, the practice of attachment applies to all divisions of the High Court; and the several rules of the order deal with the practice in attachment. These rules are, however, substantially the same as the provisions of the Common Law Procedure Acts, 1854 and 1860; so that the decisions under those Acts are applicable to the present practice.

CHAPTER I.

Attachment of Debts in the High Court of Justice.

The provisions of Order XLV. are as follows:—

Of debts.

1. Where a judgment is for the recovery by, or paymen to any person of money, the party entitled to enforce it may apply to the Court or a Judge, for an order that the judgment debtor be orally examined as to whether any and what debts are owing to him, before an officer of the Court, or such other person as the Court or a Judge shall appoint; and the Court or Judge may make an order for the examination of such judgment debtor, and for the production of any books or documents.

Ex parte application for.

2. The Court or a Judge may, upon the *ex parte* application of such judgment creditor, either before or after such oral examination, and upon affidavit by himself or his solicitor stating that judgment has been recovered and that it is still unsatisfied, and to what amount, and that any other person is indebted to the judgment debtor, and is within the jurisdiction, order that all debts owing or accruing from such third person [hereinafter called the garnishee] to the judgment debtor shall be attached to answer the judgment debt; and by the same and any subsequent order it may be ordered that the garnishee shall appear before the Court or a Judge or an officer of

the Court, as the Court or a Judge shall appoint, to shew cause why he should not pay the judgment creditor the debt due from him to the judgment debtor, or so much thereof as may be sufficient to satisfy the judgment debtor.

Notice to garnishee.

3. Service of an order that debts due or accruing to the judgment debtor shall be attached, or notice thereof to the garnishee, in such manner as the Court or Judge shall direct, shall bind such debts in his hands.

Execution on garnishee.

4. If the garnishee does not forthwith pay into Court the amount due from him to the judgment debtor, or an amount equal to the judgment debt, and does not dispute the amount due or claimed to be due from him to the judgment debtor, or if he does not appear upon summons, then the Court or Judge may order execution to issue, and it may issue accordingly, without any previous writ or process to levy the amount due from such garnishee, or so much thereof as may be sufficient to satisfy the judgment debt.

Garnishee may dispute.

5. If the garnishee dispute his liability, the Court or Judge, instead of making an order that execution shall issue, may order that any issue or question necessary for determining his liability be tried or determined in any manner in which any issue or question in an action may be tried or determined.

Third party to appear.

6. Whenever in proceedings to obtain an attachment of debts it is suggested by the garnishee that the debt sought to be attached belongs to some third person, or that any third person has a lien or charge upon it, the Court or Judge may order such third person to appear and state the nature and particulars of his claim upon such debt.

Power of Court as to third party.

7. After hearing the allegations of such third person under such order, and of any other person whom by the

same or any subsequent order the Court or Judge may order to appear, or in case of such third person not appearing when ordered, the Court or Judge may order execution to issue to levy the amount due from such garnishee, or any issue or question to be tried or determined according to the preceding Rules of this Order, and may bar the claim of such third person, or make such other order as such Court or Judge shall think fit, upon such terms, in all cases, with respect to the lien or charge (if any) of such third person and to costs, as the Court or Judge shall think just and reasonable.

Payment of execution a valid discharge.

8. Payment made by or execution levied upon the garnishee under any such proceeding as aforesaid shall be a valid discharge to him as against the judgment debtor, to the amount paid or levied, although such proceeding may be set aside, or the judgment reversed.

Book to be kept.

9. There shall be kept by the proper officer a debt attachment book, and in such book entries shall be made of the attachment and proceedings thereon, with names, dates, and statements of the amount recovered, and otherwise; and copies of any entries made therein may be taken by any person upon application to the proper officer.

Costs.

10. The costs of any application for an attachment of debts and of any proceeding arising from or incidental to such application, shall be in the discretion of the Court or a Judge.

Who may attach.

It will be well to consider first, Who may proceed to attach a debt?

It is necessary, as appears from the terms of Rule 1, that the creditor seeking to attach must have recovered

a *judgment*, whereby some money has become payable to him; a mere rule or order is insufficient.

Thus in the case of *Re Frankland* (L. R. 8 Q. B. p. 18: 42 L. J. Q. B. p. 13), it was held that a person who had obtained a rule ordering the payment of costs, was not, by the force of § 18 of 1 & 2 Vict. c. 110, a judgment creditor within the garnishment clauses of the C. L. P. Act, 1854; although it was provided by 1 & 2 Vict. c. 110, that all rules of court of common law whereby any sum of money or costs shall be payable to any person shall have the effects of judgments in the Superior Courts of Common Law, and the persons to whom such monies or costs shall be payable shall be deemed judgment creditors within the meaning of the Act; and all remedies given by the Act to judgment creditors are given to such persons.

So too in the case of *Best* v. *Pembroke* (L. R. 8 Q. B. 363), it was held that a person who had obtained an order for the costs of an interpleader issue, and entered t of record pursuant to § 7 of the Interpleader Act, 1 & 2 Wm. IV. c. 58, so as to have the effect and force of a judgment, was not a judgment creditor within the meaning of "the garnishee clauses." *

In the case of *Re Price* (L. R. 4 C. P. 155), it was held that an order of the Court of Chancery for the payment of money could not be enforced by attachment under the garnishee clauses in a Common Law Court. However, now, since the Judicature Acts judgment creditors in Chancery can attach debts, as well as judg-

* *Hartley* v. *Shemwell* (1 B. & S. 1: 30 L. J. Q. B. 223), in so far as the decision therein was contrary to that in *Best* v. *Pembroke*, must, it is submitted, be now considered as overruled.

ment creditors at common law: and a common law court would not now refuse to attach a debt, because it was an equitable one; though of course, neither the Chancery nor the Common Divisions would interfere in any way with each other's process.

In the Irish case of *The Commissioners of Donations* v. *Archbold* (14 Irish C. L. R. 67, Q. B.), it was held, under the Irish C. L. P. Act, 1855, that an order of the Irish Lord Chancellor for payment of money by a party could not be enforced at common law by attaching a sum due to the party disobeying the order.

In the case of *Cremetti* v. *Crom* (L. R. 4 Q. B. D. 225: 48 L. J. Q. B. 337: 27 W. R. 401), it was held that an order dismissing an action with costs for want of prosecution could not be enforced by attachment of debts under Order XLV. rule 2, even although it is provided by Order XLII. rule 20 of the Rules of 1875 that every order of a Court or a Judge whether in an action, cause or matter, may be enforced in the same manner as a judgment to the same effect. "One test," said Manisty, J., "is whether the affidavit required by Order XLV. rule 2 can be made. It clearly cannot."

In *Baynard* v. *Simmons* (24 L. J. Q. B. 253: 5 Ell. & Bl. 59), it was decided that an executor of a judgment creditor was not a person who could *straightway* proceed to attach a debt due to the judgment debtor; but that it was necessary that the executor should first revive the judgment recovered by his testator, *or* make himself a party to the record, by entering a suggestion upon the roll. And now it is provided by Order L. rule 4 of the Rules of 1875, that "where by reason of marriage, death, or bankruptcy, or any other event occurring after

the commencement of an action, and causing a change or transmission of interest or liability, or by reason of any person interested coming into existence after the commencement of the action it becomes necessary or desirable that any person not already a party to the action should be made a party thereto, or that any person already a party thereto should be made a party thereto in another capacity, an order that the proceedings in the action shall be carried on between the continuing parties to the action and such new party or parties may be obtained *ex parte*, upon application to the Court or a Judge upon an allegation of such change or transmission of interest or liability, or of such person interested having come into existence."

In *Kennett* v. *Westminster Improvement Commissioners* (25 L. J. Ex. 97 : 11 Ex. 349), it was held as *one* reason for refusing to allow a judgment creditor to attach a debt due to the judgment debtor that the judgment debt was one, the *immediate* payment of which the judgment creditor could not enforce. (See this case more fully referred to, *post*, p. 166.)

In *Jones* v. *Jenner* (25 L. J. Ex. 319 : 2 Jur. N. S. 574), Bramwell, B. said that in his opinion the garnishee clauses applied wherever the party could sue out a *fieri facias*.

Against whom order may be made.

With regard to the question—Against whom an attachment order may be made? rule 2 shows that the garnishee must be within the jurisdiction of the Court.

It seems too that the order may be made against *executors* if the testator was indebted to the judgment debtor, but in this case the order ought to show on its face that it is directed to them as executors, and does not profess to charge them personally : *Per* Mellish,

L. J., in *Stevens v. Phelips.* (L. R. 10 Ch. App. 423: 44 L. J. Ch. 689.)

Has judgment creditor disentitled himself?

The next consideration is—"Has the judgment creditor taken any steps which disentitle him from attaching a debt which he otherwise could have attached?"

In *Jones* v. *Jenner* (25 L. J. Ex. 319: 2 Jur. N. S. 574), it was held that a judgment creditor who had levied a plaint upon his judgment in the County Court, and had there obtained an order for payment of the amount by instalments, some of which had been paid, could not afterwards proceed by way of attachment of debts. "If," said Pollock, C. B., "a plaintiff elects to enforce his judgment in the Inferior Court, there he must remain."

In *Jauralde* v. *Parker* (30 L. J. Ex. 237: 9 W. R. 346: 6 H. & N. 431), it was held that a judgment creditor who had arrested his judgment debtor under a *ca. sa.* and detained him in execution, could not proceed by way of attachment.*

In *Re Halahan* (11 W. R. 10: 7 L. T. N. S. 278), the judgment creditor had taken the judgment debtor in execution under a *ca. sa.*, but the latter obtained his discharge from custody through the institution of bankruptcy proceedings. These proceedings proved abortive. The judgment creditor then proceeded by way of attachment, and a sum equal to about one third of his debt was paid into Court by a garnishee: for the remaining two thirds,

* In *Hartley* v. *Shemwell* (30 L. J. Q. B. 223: 1 B. & S. 1) the judgment creditor was allowed to attach a debt due to his judgment debtor, although the garnishee (*his* debt being a judgment debt) had been taken in execution under a *ca. sa.*: but in this case, it will be observed that it was the garnishee who was taken in execution under the *ca. sa.*, *not the judgment debtor.*

the judgment creditor then arrested his debtor again. It was held that under these circumstances, the judgment creditor was entitled to the one third paid into Court.

So much for the position of the parties, and the conditions necessary to entitle a person to adopt the remedy at all.

But it may be that the judgment creditor is not aware whether any debts are due to his judgment debtor, or even if aware that debts are due, he may not know from *whom* such debts are due.

Method of ascertaining debtors of judgment debtor.

In this event, the judgment creditor is enabled by rule 1 to take out a summons at Chambers (before a Master or District Registrar) calling upon the judgment debtor, his solicitor, or agent to attend at Chambers to shew cause why he should not attend and be orally examined as to any and what debts are owing to him, at the time and place to be appointed, and why he should not produce his books at the time of such examination. (See form of summons, *post*, in Appendix A, form 1, p. 193.)

This summons must be duly served upon the judgment debtor, and on the hearing, whether he appears or not, an order will be made, directing the judgment debtor to attend and be examined as to whether any and what debts are owing to him before the person appointed and at the time and place appointed, and also directing the judgment debtor to produce his books on the occasion. (See form of order, *post*, in Appendix A, form 2, p. 194.)

This order is granted upon an affidavit, to which a verified copy of the judgment is attached, stating that the judgment is unsatisfied. The affidavit should be either the judgment creditor's, or his solicitor's. (See form of affidavit, *post*, in Appendix A, form 3, p. 194.)

The person directed to take the examination (probably the Master or District Registrar), will endorse the order with an appointment of the time and place for holding it.

The order must be personally served on the judgment debtor, or at least brought definitely to his knowledge.

Thus in *Mason* v. *Muggeridge* (18 C. B. 642), it was held that service of the order upon the wife of the judgment debtor, without more was insufficient: and Lindley, J., at Chambers, May 10, 1878, has held that personal service is necessary.

If the judgment debtor disobeys or disregards the order, he is liable to attachment of person for contempt. However, before an attachment will be granted, the judgment creditor must show, by affidavit, that the debtor had the means of complying with the order, or that conduct money to enable him to comply with it had been offered to him, or some reason why he cannot be examined at his own residence. (*Protector Endowment Company* v. *Whitlam*, 36 L. T. 467.)

In *Dickson* v. *Neath and Brecon Railway Company* (L. R. 4 Ex. 87 : 38 L. J. Ex. 57 : 19 L. T. 702 : 17 W. R. 501), it was held that an order cannot be made for the examination of the directors, or officers, of a company, against whom a judgment has been recovered.

With respect to the nature of the examination which the judgment debtor has to undergo, the Court of Appeal in the recent case of *The Republic of Costa Rica* v. *Strowsberg* (L. R. 16 Ch. Div. 8), has held, reversing the decision of Malins, V. C. that the judgment debtor may not only be asked what debts are owing to him, but may be subjected to the strictest cross-examination as to his means, and be compelled to

answer all questions which may tend to throw any light upon the point.

The judgment creditor having, either by means of this preliminary process or by some other means, obtained full information with respect to the state of the affairs of the judgment debtor, is in a position to know what, if any, debts are due from third parties to the judgment debtor.

Before however proceeding to consider in its different stages the procedure he must adopt, this will be the proper place to examine the decisions on the question —*What is and what is not an attachable debt?*

What is and what is not an attachable debt.

Speaking generally, debts due from a third person to the judgment debtor, and in which the judgment debt is beneficially interested, are attachable. Two tests have been proposed for deciding whether or not a debt is attachable: 1. Can the judgment debtor maintain an action for it against the third person? 2. Would the debt vest in the judgment debtor's trustee in bankruptcy, if he became insolvent? Though perhaps neither of these tests is absolutely conclusive on the point, yet it would be well, always to keep them in mind, in considering whether a debt is attachable or not.

Cases of attachable debts.

In the following cases it has been held that there was an attachable debt:—

1. An equitable debt, since the passing of the Judicature Acts. (*Wilson* v. *Dundas*, W. N. 1875, 232; *Summers* v. *Morphew*, 61 L. T. Journal, 140.)

2. A debt due, but not yet payable (*debitum in præsenti, solvendum in futuro*). (*Sparks* v. *Young*, 8 Irish C. L. R. 251; *Tapp* v. *Jones*, L. R. 10 Q. B. 591: 44 L. J. Q. B. 127: 33 L. T. 201; 23 W. R. 694; *Ex parte Joselyne, re*

Watt, L. R. 8 Ch. Div. 327, C. A.) In this case, supposing the garnishee's debt is payable in instalments, one order for payment is sufficient; there need not be a new order, as the several instalments become payable. Of course the garnishee cannot be made to pay the judgment creditor sooner than he was bound to pay the judgment debtor. On the whole question of the attachment of debts, the judgment of Pigott, C. B., in *Sparks* v. *Young* (*ubi supra*) is worth reading.

3. Rent. (*Mitchell* v. *Lee*, 36 L. J. Q. B. 154: L. R. 2 Q. B. 259.) It is a moot point whether the effect of the Apportionment Act, 1870 (33 & 34 Vict. c. 35) by which rent is considered as accruing due *de die in diem*, and is rendered apportionable accordingly, is to make rent attachable before it is payable. See the remarks of Crompton, J., in *Jones* v. *Thompson* (Ell. Bl. & Ell. 63); and cf. *In re Cowans* (L. R. 14 Ch. Div. 638: 49 L. J. Ch. 402).

4. A debt due to one of three joint judgment debtors. (*Miller* v. *Mynn*, 28 L. J. Q. B. 324: 1 Ell. & Ell. 1075; 7 W. R. 524.)*

5. An undoubted debt, though one the amount of which is unascertained. (*Daniel* v. *McCarthy*, 7 Irish C. L. R. 261.)

6. A debt for which the garnishee has already given the judgment debtor a cheque, at the time of the service of the order *nisi* upon him, *if* upon service of such order

* In *Chapman* v. *Collis* (6 L. T. N. S. 282) the Court of Queen's Bench expressed an opinion that a judgment creditor cannot attach a debt due from one to another of his joint judgment debtors. It is difficult to see why he should not: but certainly the question is hardly a practical one: for why should not the judgment creditor issue execution *at once* against the substantial judgment debtor on his judgment?

the garnishee stops payment of the cheque. (*Cohen* v. *Hale*, L. R. 3 Q. B. D. 373 : 47 L. J. Q. B. 496 : 39 L. T. 35 : 26 W. R. 680.) *Quære:* Is the garnishee in such a case bound to stop payment at once : and if he does not, has the judgment creditor then, any remedy ?

7. A debt due to the judgment debtor as executor, if he has been sued as executor : and this too, though a decree has been made in Chancery for the administration of the testator's estate, after the attachment order. (*Burton* v. *Roberts*, 29 L. J. Ex. 484 : 6 H. & N. 93 ; *Fowler* v. *Roberts*, 2 Giff. 226 : 8 W. R. 492.) The doubt expressed on this point in *Chapman* v. *Collis* (6 L. T. N. S. 282) would seem to be not well founded.

8. An annuity payable to a widow by the trustees of her husband's will. (*Nash* v. *Pease*, 47 L. J. Q. B. 766.) In this case the annuity was for the benefit of the widow and her son, and an inquiry was directed as to how much was necessary for the son's maintenance ; and the residue was ordered to be attached, and paid to the judgment creditor.

9. Money in the hands of the official manager of a company being wound up, and applicable for payment of a sum due to the judgment debtor. (*Ex parte Turner*, 30 L. J. Ch. 92 : 2 De G. F. & J. 354.)

10. Money in the hands of a receiver in an administration action. This was held to be attachable by a judgment creditor of a *cestui que trust* in *In re Cowans* (L. R. 14 Ch. D. 638 : 49 L. J. Ch. 402), by V.-C. Hall. The order in this case directed the receiver to pay over *rents*, as they accrued due, to the judgment creditor till the debt was satisfied : this perhaps was rather an extension of the principle of *Tapp* v. *Jones*.

11. Proceeds of execution in the hands of the sheriff.

(*O'Neill* v. *Cunningham*, 6 Irish R. C. L. 503.) In this case the execution was *against the judgment debtor*, and the sheriff held surplus proceeds in his hands. In *Murray* v. *Simpson*, 8 Irish C. L. R. App. xlv., the sheriff had levied *at the suit of the judgment debtor* and the proceeds were attached in his hands before he had paid them over to the judgment debtor: But see *Williams* v. *Reeves* (12 Ir. Ch. R. 173), which may perhaps be regarded as the only authority for the proposition that money in the sheriff's hands, is *in custodiâ legis* and cannot be dealt with, without leave of the Court.

12. Money paid into Court and standing to the credit of a party to a cause. (*Adam* v. *Gillem*, 9 Ir. R. C. L. 140.) But see *Jones* v. *Brown* (29 L. T. 79), *post*, p. 165.

13. Money payable by one Railway Company to another, under a statutory agreement by which Company A. worked a line, and paid over to Company B. a fixed sum for payment of interest on certain stock held by shareholders in Company B. (*Bouch* v. *Sevenoaks, &c. Railway Company*, L. R. 4 Ex. 133 : 48 L. J. Ex. 338.)

14. A pension given solely in respect of *past* services. *Dent* v. *Dent*, L. R. 1 P. & D. 366 : 15 W. R. 591 : 15 L. T. 635 : the case of an Indian officer; *Wilcock* v. *Terrell*, L. R. 43 Ex. Div. 323 : 39 L. T. 84 : the case of a County Court Judge; *Sansom* v. *Sansom*, L. R. 4 P. D. 69 : the case of a servant in the Civil Service. These were all cases of sequestration : but they would equally apply in attachment proceedings. Observe the distinction between a pension for *past* services, and half-pay where the party can be called on again to serve.

15. Money of the judgment debtor's, in the hands of his bankers. The law regarding the relation of banker

and customer as one of debtor and creditor, it seems to follow that the money is attachable. (Cf. *Seymour* v. *Corporation of Brecon*, 29 L. J. Ex. 243 : and remarks of the County Court Judge in *Dolphin* v. *Layton*, L. R. 4. C. P. D. 131.)

Cases of no attachable debt.

In the following cases it has been decided that there was no attachable debt.

1. A verdict obtained by the judgment debtor, on which judgment has not yet been signed.

Thus in *Jones* v. *Thompson* (27 L. J. N. S. Q. B. 234 : E. B. & E. 63) the judgment creditor was not allowed to attach a verdict for £675 which the judgment debtor had obtained in an action for unliquidated damages. In answer to the argument that it was at least a debt "accruing" within the meaning of the Act, Wightman, J., said, "It appears to me that it is neither a debt owing, or accruing. The latter word can only be applied in my opinion to a *debitum in præsenti, solvendum in futuro.* There must be a debt perfected to entitle a judgment creditor to the benefit of this clause : " and *per* Crompton, J., " There is a large class of cases, which come under this head (*sc.* of a *deb. in pr. solv. in fut.*), such as the case between the drawer and payee of a promissory note still running, in which I have always held at Chambers and I understand, other judges also, that there is a debt. On the other hand I have always held that it is not sufficient that in all probability there will be a debt as in the cases of rent, or annuities not yet due. The mere fact that it is most probable there will be a debt, is not sufficient ; there must be an actual debt."

In *Shaw* v. *Shaw* (18 L. T. Irish Q. B. 420), the Irish Court following *Jones* v. *Thompson* refused likewise to attach

a verdict for unliquidated damages. In *Dresser* v. *Jones* (28 L. J. C. P. 281 : 6 C. B. N. S. 429), the same point arose, save that the verdict was for the whole amount sued for on a policy of marine insurance; the necessity of proceeding to attach immediately *after*, and not *before* judgment was obtained, was demonstrated by the priority granted to a judgment creditor, who had attached the debt, *after* judgment had been signed on the verdict. (Cf. *In re Newman, ex parte Brooke*, L. R. 3 Ch. Div. 494.)

2. A superannuation allowance payable under a resolution of a Board of the Directors of a Company to a retired clerk. (*Innes* v. *East India Company*, 25 L. J. C. P. 154 : 17 C. B. 351.)

In this case it was sought to attach an instalment of the allowance. In refusing the application, Jervis, C. J., said, "In order to make allowances of this sort binding upon the Company they must be granted in the usual form, viz. by deed. I think moreover that this allowance is only a gratuity and not a debt." (Cf. *Ex parte Hawker, in re Keely*, L. R. 7 Ch. App. 214.) See however *Dent* v. *Dent*, L. R. 1 P. & D. 366, and the other cases cited, *ante*, p. 161.

3. Debts *bonâ fide* assigned by the judgment debtor before judgment is obtained against him (*Hirsch* v. *Coates*, 25 L. J. C. P. 315 : 18 C. B. 757), and even after it, if before service of the order *nisi* upon the garnishee. (*Wise* v. *Birkenshaw*, 29 L. J. Ex. 240.) Nor is it at all necessary that notice of the assignment should have been given to the garnishee. (*Pickering* v. *Ilfracombe Railway Company*, L. R. 3 C. P. 235 : 37 L. J. C. P. 118 ; *Robinson* v. *Nesbitt*, L. R. 3 C. P. 264 : 37 L. J. C. P. 124.)

4. A legacy due to the judgment debtor, in the hands of an executor; even though the executor has expressed

his readiness to pay the money over to the judgment creditor. (*Macdonald* v. *Hollister*, W. R. 523.) "A legacy," said Parke, B., "cannot be attached unless there has been an account stated such as to entitle the party to maintain an action." The recent case of *In re Cowans* (49 L. J. Ch. 402) would seem to make this rule, a doubtful one.

5. Salary not payable, and only partly earned. (*Hall* v. *Pritchett*, L. R. 3 Q. B. D. 215 : 47 L. J. Q. B. 15 : 26 W. R. 95.)

In this case it was unsuccessfully sought to attach the salary of a medical officer, on June 15, which was not payable till completion of the services, for which it was given, on June 30th.

6. The surplus of a bankrupt's estate, in the hands of the assignee, or trustee. (*Re Greensill*, L. R. 8 C. P. 24 : 42 L. J. C. P. 55.)

In this case it was unsuccessfully sought to attach in the hands of the official assignee of the Court of Bankruptcy, the surplus of the bankrupt's estate after payment of 20*s.* in the £ to all the creditors under the bankruptcy; and the Irish cases of *Boyes* v. *Simpson* (8 Irish C. L. R. 523) and *Gilmour* v. *Simpson* (8 Irish C. L. R. App. xxxviii.) in which it was decided that dividends in Bankruptcy due to the judgment debtor could not be attached by the judgment creditor in the hands of either the creditors', or the official, assignee, were approved of.

7. Arrears of a Government annuity granted to the wife of the judgment debtor *dum sola*. (*Dingley* v. *Robinson*, 26 L. J. N. S. Ex. 55.) "This is not a *debt* to the judgment debtor," said Martin, B.

8. Money in the hands of the Registrar of the County

Court and paid in by a judgment debtor of *the* judgment debtor. (*Dolphin* v. *Layton*, L. R. 4 C. P. D. 133.)

Doubt was however thrown on the correctness of this decision in the recent case of *Re Cowans* (see 49 L. J. Ch. 402), and it certainly seems open to grave doubt.

9. A mere notice to treat under the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18). (*Richardson* v. *Elmit*, L. R. 2 C. P. D. 9 : 36 L. T. 58). "It is impossible to say at present," said Grove, J., "what may be the result of the notice to treat. It may turn out that the party to whom the notice has been given has no interest whatever in the premises, in respect of which he can be entitled to compensation. It clearly is not a debt owing or accruing within the meaning of the rule."

10. The monies to become due under a promissory note not yet due cannot be attached. (*Pine* v. *Kinner*, 11 Ir. R. C. L. 40.) "This being a negotiable instrument," said Lawson, J., "no order of ours can prevent its being endorsed over." The same observation would apply to a bill of exchange with equal force.

11. Money paid into Court in an action brought by the judgment debtor, but in which action judgment has not yet been obtained. (*Jones* v. *Brown*, 29 L. J. 79.) Perhaps however now as the plaintiff would under the provisions of Order XXX. of the Rules of the S. C. 1875 have full power to take the money out, either in whole or part satisfaction of his claim, the case would be different. See too, *ante*, p. 161, the case of *Adams* v. *Gillem* (9 Irish C. L. R. 148).

12. A bond of indemnity against costs given by a person to the judgment debtor to induce him to bring an action against the judgment creditor. (*Johnson* v. *Diamond*, 24 L. J. Ex. 217 : 11 Ex. 73.)

In this case Diamond was the real plaintiff in an action which he had induced Courtis the nominal plaintiff, to bring against Johnson. Diamond by bond stipulated with Courtis that he (Diamond) would pay Johnson all costs which eventually Courtis might in this action be liable to pay Johnson. Courtis was nonsuited, and Johnson had judgment to recover £199 1s. 10*d.* against Courtis. Diamond, though requested so to do by Courtis, did not pay Johnson the £199 1s. 10*d.* Johnson then sought to attach the money in Diamond's hands as a debt due from Diamond to Courtis: but it was held that there was no attachable debt.

"This is a case," said Parke, B., "of a covenant to indemnify;" and again, "In this case I think there is not any debt. It is perfectly clear that the legislature never intended to attach causes of action."

13. A debt due to judgment debtors who, by Act of Parliament were bound to pay all holders of their *bonds* of whom the judgment creditor was one, *pari passu.* (*Kennett* v. *Westminster Improvement Commissioners,* 25 L. J. Ex. 97.)

In this case the Commissioners under their statutory powers borrowed monies secured by bonds, by the terms of which all the bondholders were to be repaid *pari passu.* A bondholder sued the Commissioners and obtained judgment by default. It was held that he could not attach a debt due from a third party to the Commissioners, as that would give him a preference over the other bondholders in violation of the terms of the bond. *Per* Alderson, B., "An execution creditor cannot attach a debt, which it would be a breach of trust for the execution debtor to pay over to him."

14. Money in the hands of a receiver appointed by the Court of Chancery, and by it directed to be paid to the judgment debtor. (*De Winton* v. *Mayor of Brecon*, 28 Beav. 200.)

In this case, before the Judicature Acts, a judgment creditor at Common Law attached and obtained payment from the receiver of monies which the Court of Chancery directed him to pay over to the judgment debtor. The Court of Chancery ordered it to be refunded. In such a case now, it is submitted that payment could only be enforced by an order of the Chancery Division, which alone would be in a position to say whether the monies could, having regard to the purposes to which it was to be applied, be properly ordered to be paid over by the receiver to the judgment creditor, in lieu of to the judgment debtor.

15. Money paid into Court by executors in an administration suit; in which a decree for administration had been made, though the order *nisi* for attachment was served on the executors before they paid the money into Court. (*Stevens* v. *Phelips*, L. R. 10 Ch. App. 417.*)

* It is difficult to understand the principle of this decision. Apart from the fact of the administration suit pending, it seems clear from the facts that the judgment creditor's right would override that of the trustee in bankruptcy of the judgment debtor. The case seems to decide (1) that the fact of a decree having been made in an administration suit places the whole personal estate of the testator, in the possession of the Court, even though, it is as a fact, at the time of the service of the order *nisi* in the possession of the executors: and (2) that under these circumstances, the Court being thus in the possession of the funds, service on the executors of the order was useless, they having parted with the money. It is submitted that the sound ground of the decision is that before the Judicature Acts, the Court of Chancery having no original jurisdiction in the matter of attachment

16. By the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104, § 233), it is enacted that "no wages due or accruing to any seaman or apprentice shall be subject to attachment, or arrestment from any Court."

Gordon v Jennings 9 Q.B.D. 45.

17. By "The Wages Attachment Abolition Act, 1870" (33 & 34 Vict. c. 30), after reciting the inconvenience that had arisen from the attachment of wages, it was enacted that after the passing of the Act no order for the attachment of the wages of any servant, labourer, or workman, should be made by the Judge of any Court of Record or Inferior Court.

Decisions on foreign attachment in Mayor's Court.

It may be useful here to refer to some decisions as to the property liable to the process of foreign attachment in the Mayor's Court of London. By that process an *ordinary* creditor, if neither his debtor nor his debtor's property can be found within the city of London, can, if he finds residing within the jurisdiction of the Court, any debtor of *his* debtor, or any person holding property

of debts, would refuse to exercise even an equitable jurisdiction, in aid of the Common Law, in the matter.

It will be seen from a consideration of the cases, that it is no easy matter to answer the question, Can monies in the hands of, or under the control of, the Courts be attached? No doubt, the money is in the hands of a person against whom an action for the amount would not generally lie at the suit of the judgment debtor, and if this was a conclusive test, the question might be answered at once in the negative. It is submitted, however, that the true rule (though it must be admitted that it is not easily deducible from the authorities) will be found to be that if the money has been dedicated to the use of the judgment debtor, then the mere fact that it is in the hands of the Court, or one of its officers, be he Registrar, Receiver, Master, or Official assignee, will not of itself disentitle the judgment creditor from attaching it; though, he would not be allowed to receive it, if it has been paid into Court for purposes, which are inconsistent with or *might* clash with its being allowed to be paid over to the judgment creditor.

18. As to mtge debts see Chatterton v Watney 17 C.D. 378

belonging to his debtor (before any action brought), attach the property or debt, and so compel the appearance of his debtor. In default of the debtor even then appearing, he can proceed to obtain payment of the amount from the garnishee.

In the following cases it has there been held that the property was attachable.

1. Money found by the garnishee belonging to the debtor; or money given to the garnishee to keep, by the debtor. (*Tros* v. *Michell*, Cro. Eliz. 172.)

2. Debts due to a corporation. (—— v. *Hamburgh Company*, 1 Mod. 212.)

3. Part of a debt. (*Anon.*, Godb. 195, No. 282.)

In the following cases it was held that there was no attachable property.

1. Debts in which the debtor has ceased to have any beneficial interest. (*Westoby* v. *Day*, 22 L. J. Q. B. 418.)

2. Debts for which the debtor could not maintain an action. (*Webster* v. *Webster*, 31 Beav. 393.)

3. Monies of the debtor in the hands of the garnishee, and on which the garnishee has a lien, cannot be attached unless the lien is discharged. (*Nathan* v. *Giles*, 5 Taunton, 558.)

4. Money which the garnishee has been ordered to pay by the Court. (*Coppel* v. *Smith*, *Grant* v. *Harding*, 4 Term. Rep. 312.)

5. Property of the intestate in the hands of the ordinary. Com. Dig. For. Attachm.

6. Property of a foreign ambassador or potentate in the hands of their debtors in this country. (*Wadsworth* v. *Queen of Spain*, 17 Q. B. 171: 20 L. J. Q. B. 488.)

(For foreign attachment generally, see Locke on

"Foreign Attachment," and Brandon on "Foreign Attachment.")

The judgment creditor having ascertained by this preliminary process, or by some other means, that there is a debt due from a third party to the judgment debtor, obtains as a first step in his attachment proceedings an *ex parte order nisi* at Chambers from a Master (or District Registrar) attaching all debts owing or accruing from the third party to the judgment debtor.

Garnishee order *nisi*.

The latter part of this order usually consists in substance of a summons to the third party to appear at Chambers to shew cause why he should not pay to the judgment creditor the debt which he owes to the judgment debtor, or so much thereof as may be sufficient to satisfy the judgment debt. (See the form of a garnishee order *nisi*, *post*, in Appendix A, form 4, p. 195.)

This order is obtained upon an affidavit of the judgment creditor or his solicitor shewing (α) that judgment has been obtained by the judgment creditor against the judgment debtor; (β) that such judgment is unsatisfied wholly or in part; (γ) that the third party is indebted to the judgment debtor, and is within the jurisdiction. (See the form of affidavit, *post*, in Appendix A, form 5, p. 196.)

The power of making the order *nisi* is a *discretionary* power; therefore although it can technically be appealed from, yet the Judge or Court would be very unlikely to interefere with the Master's discretion in granting it. (See *Seymour* v. *Corporation of Brecon*, 29 L. J. Ex. 243.)

The order must be served personally on the garnishee.

Service thereof.

If however it be impossible or very inconvenient to serve it personally on him, notice of the order in such manner,

as the Court or Judge (and now therefore the Master or District Registrar) may direct, may be given to the garnishee. Care should in this case be taken to give the notice, as it is directed to be given.

Its effect in "binding" debt.

The service of the order on the garnishee according to the express words of rule 3 "binds the debt in his hands;" and the effect of these words has been much discussed in cases, in which, pending the attachment proceedings, the judgment debtor has become bankrupt.

In cases where judgment debtor becomes bankrupt.

Under the old Bankruptcy Acts of 1849 and 1861, it was held that, according to the wording of the sections relating to secured creditors, although a judgment creditor who had served the order *nisi* upon a garnishee, was a creditor holding security for his debt, yet that such security did not avail him as against the assignees in bankruptcy of the judgment debtor (*Holmes* v. *Tutton*, 24 L. J. C. B. 346 : 5 Ell. & Bl. 65 : 25 L. T. O. S. 177); and in *Tilbury* v. *Brown* (30 L. J. Q. B. 46), it was held that even an *order absolute for payment* by the garnishees to the judgment creditor, did not, unless payment had been made, better the judgment creditor's position as against the assignees in bankruptcy of the judgment debtor.

The Bankruptcy Act of 1869, however, differed in its definition of, and the rights it conferred on, secured creditors, from the previous Acts of 1849 and 1861. A secured creditor is defined by § 16, sub-sect. 5 of the Act of 1869 as "any creditor holding any mortgage, charge, or lien on the bankrupt's estate, or any part thereof, as a security for a debt due to him," and § 12 of the Act recognizes the right of such "creditor holding security" to realize his security.

Accordingly in the case of *Emanuel* v. *Bridger* (L. R. 9 Q. B. 286 : 43 L. J. Q. B. 96), it was held that, after an order absolute for payment had been made against the garnishee, and in *Lowe* v. *Blakemore* (L. R. 10 Q. B. 485 : 44 L. J. Q. B. 155) that after an order *nisi* for attachment, had been served, the judgment creditor's claim to the debt, in the event of the bankruptcy of the judgment debtor, overrode the claim of the trustee in bankruptcy of the judgment debtor ; and these two cases were approved of and followed by the Court of Appeal in *Ex parte Joselyne, in re Watt* (L. R. 8 Ch. Div. 327 : 38 L. T. 661), where the order *nisi* was served before the bankruptcy of the judgment debtor.*

On the other hand, in *In re Stanhope Silkstone Colliery Company* (L. R. 11 Ch. Div. 160), the Court of Appeal held that until the *service* of the garnishee order *nisi*, the judgment creditor was not in the position of a secured creditor, and that in the event of the bankruptcy of the judgment debtor (or the presentment of a petition to wind up a company) before service of that order, the judgment creditor's right was defeated. Lord Justice James, says, "In this particular case, the creditor is made his own sheriff, and he is allowed to make his own execution, just as a landlord puts in a distress himself for rent. There is no distinction in principle between them. The writ of execution against goods does not

* *Ex parte Greenway* (L. R. 16 Eq. 619) must be considered as overruled by *Ex parte Joselyne*. The latter is a strong case, because, following the principle of *Tapp* v. *Jones*, the Court of Appeal held that the judgment creditor's right overrode that of the trustee in bankruptcy in respect of monies not payable by the garnishee to the judgment debtor at the time of the latter's bankruptcy.

prevail unless it has been actually executed. So the order of attachment, or the writ of attachment—they are the same thing in my opinion—does not prevail until it has been executed by being served upon the debtor."

It was decided in *Richter* v. *Laxton* (27 W. R. 214: 39 L. T. 499), that the order overrides an attachment in the Mayor's Court, even if the latter be first in point of time. (See too *Newman* v. *Rook*, 4 C. B. N. S. 434; *Levy* v. *Lovell*, L. R. 11 Ch. Div. 220.)

The order served should be strictly regular; and if before service of it, the garnishee *bonâ fide* pays over the debt to the judgment debtor or his representative he is protected. (*Cooper* v. *Brayne*, 27 L. J. Ex. 448.)

Courses open to the garnishee.

When the order is served on the garnishee, or notice of it is given to him, his first consideration is, whether or not he disputes the debt: if he does not, and it is really due, and he has no set-off to it, his proper course is to forthwith pay the amount due from him to the judgment debtor (or an amount sufficient to satisfy the judgment) into Court (rule 4), and if he does this, then, by rule 8, such payment is a valid discharge to him as against the judgment debtor to the amount paid, even though the proceedings whereby the judgment creditor obtained his judgment be set aside, or the judgment itself set aside.

An order absolute for payment over of the money to the judgment creditor is then of course made, and the garnishee as he thus consents to the order absolute, is entitled to his costs, generally fixed at one guinea.

If however the garnishee dispute the debt alleged to be due from him to the judgment debtor, he must appear as directed by the order *nisi*, for if he do not, the Judge (Master or District Registrar) may (by rule 4) order

execution to issue against him, "and it may issue accordingly without any previous writ or process to levy the amount due from such garnishee, or so much thereof as may be sufficient to satisfy the judgment debt."

If the garnishee appears, it is to dispute his liability on some ground or other.

Rule 5 provides that any issue or question necessary for determining his liability, may be tried and determined in any manner in which any issue or question in an action may be tried and determined.

If the garnishee really has no defence, and cannot make out even a *primâ facie* case, the Master would probably exercise his discretion in not allowing the matter to be further tried (*Newman* v. *Rook*, 4 C. B. N. S. 434), and an order absolute for payment would be made against the garnishee at once. (See order absolute in Appendix A, form 6, p. 197.) If however a *primâ facie* is made out, an issue or special case would probably be directed, but whatever the order at Chambers dealing with the matter might be, it seems that the Court would be very reluctant to interfere with the *discretionary* power there exercised. (*Wyse* v. *Birkenshaw*, 29 L. J. Ex. 240; *Seymour* v. *Corporation of Brecon*, 29 L. J. Ex. 243.)

Issue directed, if there be a *primâ facie* case.

If the garnishee claims a set-off against the judgment debtor, the accounts as between the judgment debtor and the garnishee must be gone into: for the judgment creditor only stands in the shoes of the judgment debtor: and only payment of the balance due on the account, when taken, can be enforced by the judgment creditor. (*Nathan* v. *Giles*, 5 Taunt. 558.) But the accounts would only be gone into up to the date of the service of the order *nisi*: the judgment creditor would not be prejudiced

Effect of garnishee claiming set-off against J. D. or J. C.

by any alteration in the state of the accounts between the judgment debtor and the garnishee, *after* that date. (*Tapp* v. *Jones*, L. R. 10 Q. B. 591.)

On the same principle, if the garnishee have any claims against the judgment debtor, he can assert them against the judgment creditor: and they can be gone into, as a counterclaim, on the trial, or hearing. (*Kaupt* v. *Kaupt*: *cor.* Cleasby, B., June 28, 1878.)

On the other hand, the garnishee cannot set up against the judgment creditor, who is proceeding against him, as representing the judgment debtor, a set-off he (the garnishee) claims against the judgment creditor himself (*Sampson* v. *Seaton Railway Company*, L. R. 10 Q. B. 28.)

It may be that at the very time these attachment proceedings are taken against the garnishee, the latter is being sued by the judgment debtor for his debt. If this be so, in the absence of any collusion between judgment debtor and garnishee, no proceedings will be allowed to be taken against the latter. (*Richardson* v. *Greaves*, 10 W. R. 45.)

If the Master at Chambers thinks the matter fit to be determined by an issue, and the judgment creditor refuses to accept an issue, the attachment will be discharged, and the judgment creditor will have to pay the costs of the abortive proceedings. (*Wintle* v. *Williams*, 27 L. J. Ex. 311: 3 H. & N. 288.)

Issue.

If the liability of the garnishee turns on a question of fact, an issue will ordinarily be directed: the question being whether at the time of the service of the order *nisi* on the garnishee, the latter was indebted to the judgment debtor. See form of garnishee issue, *post* in Appendix A., form 8, p. 198.

With respect to the evidence at the trial, it must be

remembered that the judgment creditor, is the "*alter ego*" of the judgment debtor.

Special case.

If the question is one of law, a special case will be ordered to be stated for the opinion of the Divisional Court. (*Wilson* v. *Dundas*, W. N. 1875, p. 232.)

The proceedings subsequent to the trial of the issue, or special case, will be the same as the proceedings subsequent to the trial of an ordinary action, or the hearing of an ordinary special case.

(See *post*, in Appendix A, forms 7 and 9, directing respectively an issue, and a special case.)

Summary determination.

If the judgment creditor and the garnishee at Chambers both consent, as they can, that the Master (or District Registrar) do decide the matter summarily, this summary determination will be final, and no appeal from it will lie. (*Eade* v. *Winser*, 47 L. J. Q. B. 584.)

Proceedings, when third party's claim is suggested.

It may happen that the garnishee disputes his liability to the judgment debtor, on the ground that the debt sought to be attached belongs to some third person, or that some third person has a lien or charge upon it. If this be so, such third person will be ordered to appear and state the nature and particulars of his claim to such debt. (See form of order directing the appearance of such third person, *post*, in Appendix A, form 10.)

If such third party does not appear, when summoned, an order can be made barring his claim, and in default of the garnishee *now* paying the debt, execution can issue against him to levy the amount.*

If such third party do appear then the Master after

* The words of rule 7 would seem to allow of an issue being directed between the judgment creditor and the garnishee, even at this stage; but if the garnishee had disputed his liability in the first

hearing him, may, if he has no *primâ facie* claim, bar him, and order execution to issue against the garnishee in default of the latter paying the debt; or if the third party does make out a *primâ facie* case, he may order any issue or question to be tried or determined according to the preceding Rules of the Order, or he may make such other order as he thinks fit, upon such terms, in all cases, with respect to the lien or charge (if any), of such third person, and as to costs as he shall think just and reasonable. In fact, the proceedings after the introduction of the third person are, as between the judgment creditor and the third person, analogous to the proceedings on the appearance of the garnishee himself. If such third person claimed the debt from the garnishee the form of issue between the judgment creditor and such third person would, it is submitted, be "Whether at the time of the service of the order *nisi* upon the garnishee, the garnishee was indebted to the judgment debtor or to the third person in respect of the said debt."

If such third person claimed a lien on the debt, the form of issue would be "Whether at the time of the service of the order *nisi*, the third person had a lien on the said debt, due from the garnishee to the judgment debtor."

Right of solicitor to his lien, as against the J. C.

With respect to a lien or charge on the debt due from the garnishee, cases have arisen where the debt being a *judgment* debt, the solicitor of the judgment debtor claimed a lien on the judgment his client had recovered, for his costs in the action.

instance, solely on the ground of this third person's claim, he would not, it is submitted, be allowed afterwards to dispute his liability on other grounds. At all events, if he were allowed it would probably be on the terms of his paying all costs up to that time.

The attachment overrides the solicitor's right to a lien on the judgment, for his *general* bill of costs. (*Hough* v. *Edwards*, 26 L. J. Ex. 54.)

But if the solicitor's claim is in respect of the costs of the *particular action* in which the judgment has been recovered, it overrides the judgment creditor's right to attach the debt (*Sympson* v. *Prothero*, 26 L. J. Ch. 672: 5 W. R. Ch. 814); and if the judgment creditor, after the notice of the solicitor's lien, yet receives payment from the garnishee, he will be made to refund to the solicitor. (*Eisdell* v. *Coningham*, 28 L. J. Ex. 213.)

23 & 24 Vict. c 127, § 28.

By 23 & 24 Vict. c. 127, § 28, it is enacted that, "in every case in which an attorney or solicitor shall be employed to prosecute or defend any suit, matter, or proceeding in any Court of justice, it shall be lawful for the Court or Judge before whom any such suit, matter or proceeding has been heard, or shall be depending, to declare such attorney or solicitor entitled to a charge upon the property recovered or preserved, and upon such declaration being made, such attorney or solicitor shall have a charge upon and against and a right to payment out of the property, of whatsoever nature, tenure or kind the same may be, which shall have been recovered or preserved through the instrumentality of any such attorney or solicitor for the taxed costs, charges and expenses of or in reference to such suit, matter or proceeding, and it shall be lawful for such Court or Judge to make such order or orders for taxation of and for raising and payment of such costs, charges and expenses, out of the said property as to such Court or Judge shall appear just and proper: and all conveyances and acts done to defeat, or which shall operate to defeat such

charge or right, shall, unless made to a *bonâ fide* purchaser for value without notice, be absolutely void and of no effect as against such charge or right: provided always that no such order shall be made by any such Court or Judge in any case in which the right to recover payment by such costs, charges, and expenses is barred by any statute of limitations."

After the passing of this Act, it was held in the case of "*The Jeff Davis*" (L. R. 2 A. & E. 1), that a proctor's lien on a judgment for his costs overrode a judgment creditor's attachment.

The same point was decided in the case of "*The Leader*" (L. R. 2 A. & E. 314) with the addition, that as the garnishee had, *knowing of the proctor's claim*, yet paid over the monies to the judgment creditor, he was compelled to pay the amount again to the proctor.

The case of the "*Leader*" is an authority for the proposition that it is the *duty* of the garnishee to make known the fact to the Court, if he is aware of any claim to the debt, or claim to a lien thereon.*

In *Birchall* v. *Pugin* (44 L. J. C. P. 278: L. R. 10 C. P. 397), a judgment creditor obtained an order *nisi* attaching a debt, *pending the hearing of a summons* for a charging order taken out by the solicitor of the judgment debtor under 23 & 24 Vict. c. 127. By the exertions of the solicitor, the judgment debtor had recovered the money

* The cases of *Eisdell* v. *Coningham* and *The Leader* show that, after notice of the solicitor's lien, it is neither safe for the garnishee to pay over the debt, nor for the judgment creditor to receive it. But, it is submitted that, if the garnishee paid over, or the judgment creditor received, the money without notice of the lien, the payment would, as to the person so paying or receiving without notice, be protected.

from the garnishee. It was held that the solicitor was entitled to priority over the judgment creditor.

Payment under order discharges garnishee.

If the garnishee pays the debt under any of the orders made during the attachment proceedings, or if payment is enforced from him by execution against him, then by rule 8, he is discharged from his debt, *whatever happens.*

Thus in *Wood* v. *Dunn* (L. R. 2 Q. B. 73) and *Turnbull* v. *Robertson* (47 L. J. C. P. 296), where the garnishee paid the debt *under pressure of an execution against him*, it was held that the payment was a valid discharge to him: although if he had had time to consider the matter, to look about him, and see who was really entitled to receive the debt, it would have been his duty to take such steps before paying over the money. "We think," said Channell, B., in the former case, "that if the garnishees had notice of the deed in bankruptcy it was under such circumstances that they were unable to get the order set aside before they were compelled to pay under the immediate threat of an execution, and to save its being actually levied."

On the other hand, if instead of paying under the order of a Judge or Master, the garnishee chooses to make private arrangements with the judgment creditor as to the payment of the debt, he is not protected under rule 8. "I own," said Bramwell, B., in *Turner* v. *Jones* (1 H. & N. 878: 26 L. J. Ex. 262), "the inclination of my own opinion is that the garnishee is not protected, unless he gets a Judge's order directing payment as there mentioned. It seems to me manifest that he cannot have a right to agree with the execution creditor to substitute a different liability to that which he has entered into

with the execution debtor." (See also *Lockwood* v. *Nash*, 18 C. B. 536.)

In *Kent* v. *Tomkinson* (L. R. 2 C. P. 502), after an order had been made for execution against the garnishee, he executed a deed of composition under the Bankruptcy Act, 1861: it was held that this was a bar to the execution.

In *Culverhouse* v. *Wickens* (L. R. 3 C. P. 295) it was held that a payment into Court of money by a garnishee under a Judge's order was a valid payment within rule 8, and discharged the garnishee: and that the subsequent execution by the judgment debtor of a composition deed under the Bankruptcy Act, 1861, did not prevent the judgment creditor being entitled to the money so paid in.

With respect to the *costs* of attachment proceedings, little need be said. By rule 10, they are in the discretion of the Court or Judge (Master or District Registrar). Costs.

As has been said, if the garnishee does not dispute the debt, and consents to an order absolute for payment, he will get his costs, usually fixed at 1 guinea. If the garnishee disputes his liability, and any issue or other proceeding is directed, the costs would as a rule abide the event; and this is so, if nothing is said about costs in the order directing the issue (*Johnson* v. *Diamond*, 11 Ex. 431).

If the judgment creditor refuses to accept an issue when it is offered him, and the proceedings thus prove abortive, he will have to pay all the costs of the proceedings (*Wintle* v. *Williams*, 3 H. & N. 288; 27 L. J. Ex. 311).

CHAPTER II.

ATTACHMENT OF DEBTS IN THE COUNTY COURTS.

By orders in Council dated respectively the 10th of November, 1867, and the 18th of May, 1870, the process with respect to the attachment of debts established by the "garnishee clauses" of the C. L. P. Act, 1854, and the C. L. P. Act, 1860, was extended (in pursuance of powers for that purpose originally contained in the 105th section of the Act of 1854, and the 44th section of the Act of 1860) to the County Courts, and the procedure in those Courts is still regulated by those clauses, coupled with the provisions in Order XXIV. of the County Court Rules of 1875.

It will be best therefore to first set out (α) the garnishee clauses of the Acts of 1854 and 1860, (β) the rules of Order XXIV. of the County Court Rules of 1875.

C. L. P. Act, 1854, § 60–67.

The provisions of the C. L. P. Act, 1854, are as follows :—

Examination of judgment debtor as to debts due to him.

§ 60. It shall be lawful for any creditor who has obtained a judgment in any of the Superior Courts, to apply to the Court or a Judge for a rule or order that the judgment debtor should be orally examined as to any and what debts are owing to him before a Master of the Court, or such other person as the Court or Judge shall

appoint; and the Court or Judge may make such rule or order for the examination of such judgment debtor, and for the production of any books or documents, and the examination shall be conducted in the same manner as in the case of an oral examination of an opposite party before a Master under this Act.

Judge may order an attachment of debts.

§ 61. It shall be lawful for a Judge, upon the *ex parte* application of such judgment creditor, either before or after such oral examination, and upon affidavit by himself or his attorney stating that judgment has been recovered, and that it is still unsatisfied, and to what amount, and that any other person is indebted to the judgment debtor, and is within the jurisdiction, to order that all debts owing or accruing from such third person (hereinafter called the garnishee) to the judgment debtor shall be attached to answer the judgment debt; and by the same or any subsequent order it may be ordered that the garnishee shall appear before the Judge or a Master of the Court, as such Judge shall appoint, to show cause why he should not pay the judgment creditor the debt due from him to the judgment debtor, or so much thereof as may be sufficient to satisfy the judgment debt.

Order for attachment to bind debts.

§ 62. Service of an order that debts due or accruing to the judgment debtor shall be attached, or notice thereof to the garnishee, in such manner as the Judge shall direct, shall bind such debts in his hands.

Proceedings to levy amounts due from garnishee to judgment debtor.

§ 63. If the garnishee does not forthwith pay into Court the amount due from him to the judgment debtor, or an amount equal to the judgment debt, and does not dispute the debt due or claimed to be due from him to the judgment debtor, or if he does not appear upon summons, then the Judge may order execution to issue,

and it may be sued forth accordingly, without any previous writ or process, to levy the amount due from such garnishee towards satisfaction of the judgment debt.

Judge may allow judgment creditor to sue garnishee.

§ 64. If the garnishee disputes his liability, the Judge instead of making an order that execution shall issue, may order that the judgment creditor shall be at liberty to proceed against the garnishee by writ, calling upon him to show cause why there should not be execution against him for the alleged debt, or for the amount due to the judgment debtor, if less than judgment debt, and for costs of suit; and the proceedings upon such suit shall be the same, as nearly as may be, as upon a writ of revivor issued under "The C. L. P. Act, 1852."

Garnishee discharged.

§ 65. Payment made by or execution levied upon the garnishee under any such proceeding as aforesaid shall be a valid discharge to him as against the judgment debtor to the amount paid or levied, although such proceeding may be set aside, or the judgment reversed.

Attachment book to be kept by the Masters of each Court.

§ 66. In each of the Superior Courts there shall be kept at the Master's office a debt attachment book, and in such book entries shall be made of the attachment and proceedings thereon, with names, dates and statements of the amount recovered, and otherwise; and the mode of keeping such book shall be the same in all the Courts; and copies of any entries made therein may be taken by any person, upon application to any Master.

Costs of application.

§ 67. The costs of any application for an attachment of debt under this Act, and of any proceeding arising from or incidental to such application, shall be in the discretion of the Court or a Judge.

C. L. P. Act, 1860, § 28–31.

The provisions of "The C. L. P. Act, 1860," are as follows:—

Judge may refuse to interfere in proceedings to attach debts.

§ 28. In proceedings to obtain an attachment of debts under "The C. L. P. Act, 1854," the Judge may in his discretion refuse to interfere where, from the smallness of the amount to be recovered, or of the debt sought to be attached, or otherwise, the remedy sought would be worthless or vexatious.

Proceedings where third person has a lien on the debt.

§ 29. Whenever in proceedings to obtain an attachment of debts under the Act above mentioned, it is suggested by the garnishee that the debt sought to be attached belongs to some third person who has a lien or charge upon it, the Judge may order such third person to appear before him, and state the nature and particulars of his claim upon such debt.

Judge may bar claim of third person and make orders.

§ 30. After hearing the allegations of such third person upon such order, and of any other person whom by the same or any subsequent order the Judge may think fit to call before him, or in case of such third person not appearing before him upon such summons, the Judge may order execution to issue to levy the amount due from such garnishee or the judgment creditor to proceed against the garnishee, according to the provisions of "The C. L. P. Act, 1854," and he may bar the claim of such third person, or make such other order as he shall think fit, upon such terms, in all cases, with respect to the lien or charge (if any) of such third person, and to costs, as he shall think just and reasonable.

Provisions of 17 & 18 Vict., c. 125, to apply to orders.

§ 31. The provisions of "The C. L. P. Act, 1854," so far as they are applicable, shall apply to any order, and the proceedings thereon made and taken, in pursuance of the herein next before mentioned powers under this Act.

County Court

The provisions of "The County Court Rules, 1875," Order XXIV. are as follows:—

Rules, 1875, Order XXIV.

1. [*Where plaintiff desires defendant to be examined at the trial as to the debts due to him, he must give notice.*] Where a plaintiff is desirous that the defendant, if the defendant shall have judgment given against him, shall be orally examined forthwith after the judgment shall have been given, as to what debts are due and owing or accruing to him, the plaintiff shall, before the action is called on, lodge with the registrar a statement in writing of the name, address and description of the person or persons whom he considers are debtors to the defendant, and who quoad such debts are within the jurisdiction of the Court.

2. [*Examination of defendant as to debts owing to him. —Order thereupon.*] Where such a statement has been lodged, the defendant, if he shall have had judgment given against him, may then be examined before the Court, at the request of the plaintiff, as to any debts due, owing or accruing to the defendant from any persons mentioned in the statement, and if any such person be then present, he may be required forthwith, if he admits the debt; to show cause why he should not be ordered to pay into Court for the benefit of the judgment creditor such debts, or so much thereof as will satisfy the judgment debt, and the Court may make an order for the payment of such debts, or so much thereof as will satisfy the judgment debt, and such order shall be entered in the minute book and may be enforced in like manner as any order made in any action in the Court; and where such person pays the money as ordered, he shall not be liable for any costs, and an entry of the payment shall be made in the "Cash Book" and "Ledger."

3. [*Proceedings against garnishee.*—30 & 31 Vict.

c. 142, § 1.] A plaintiff who has not lodged such statement, or a defendant who has obtained judgment against a plaintiff, may at any time after the judgment, upon lodging with the registrar of the Court in which the judgment was given an affidavit stating the fact of the judgment, and of its being unsatisfied, and that a third person [hereinafter called the garnishee] is indebted to the judgment debtor, and is quoad such debt within the jurisdiction of the Court and could be sued therein without leave, or by leave under § 1 of the County Courts Act, 1867, may enter a plaint to obtain payment to him of the amount of the debt due to the judgment debtor from the garnishee, and where the garnishee is not quoad such debt within the jurisdiction of the Court, the judgment creditor, upon lodging a certificate of the judgment and a copy of the said affidavit with the registrar of the Court in the district of which the garnishee resides or carries on business, may enter a plaint therein.

4. [*Service of garnishee summons.*] The summons on the plaint shall be personally served on the garnishee, and when so served it shall attach in the hands of the garnishee all debts due, owing or accruing from him to the judgment debtor.

5. [*No costs where garnishee pays.*] Where the garnishee shall pay the money into Court five clear days before the return-day, he shall not be liable for any costs incurred by the judgment creditor.

6. [*Order on trial.*] Upon the return day the Court shall determine as to the liability of the garnishee, and as to the party by whom the costs of the proceeding by plaint shall be paid, and make an order or orders in accordance with such determination.

7. [*Certificate of payment and order to be sent.*] Where the Court in which the garnishee is sued is not the Court in which the judgment upon which he was garnished was given, the registrar of such Court shall send a certificate of the order of his Court to the Court in which such judgment was given, and of payment made, if any, before or after the return day.

The provisions of the Common Law Procedure Acts, 1854 and 1860, are, it will be observed, almost identical with those of Order XLV. of the Rules of the Judicature Act, 1875.

Law in County Court same as in Superior Courts.

All the cases decided in the Superior Courts as to who may attach debts, what is and what is not an attachable debt, &c., &c., are equally applicable to County Courts. (See Chapter I. *passim.*)

The *law* with respect to the attachment of debts in the County Courts being thus identical with the law in the Superior Courts, it is only necessary here to sketch the *procedure* in the County Courts, as regulated by the statutory provisions and rules just set out.

Procedure in County Courts.

It will be observed that a *plaintiff* in a County Court action has a means of proceeding to attach debts peculiar to himself, conferred on him by rules 1 and 2 of Order XXIV.

Plaintiff's power under rules 1 and 2.

He is enabled, *before* the action in which he is plaintiff is called on, to lodge with the Registrar a statement in writing of the name, address, and description of the person or persons whom he considers are debtors to the defendant, and who quoad such debts are within the jurisdiction of the Court. (See form of this statement, *post*, in Appendix B, form 1.)

If he recovers judgment in the action, the plaintiff may at once have the defendant examined as to the debts alleged to be due to him from the persons referred to in the statement, and if such person or persons are present, they may at once, if they admit the debt, be ordered to pay it to the plaintiff, or into Court for the plaintiff's use. (See form of order, *post*, in Appendix B, form 2.)

If the plaintiff knows of a friendly garnishee, this, no doubt, seems a very excellent method to adopt. But if he does not, or if the garnishee be hostile, why should such garnishee be likely to be present in Court at the time? If he be absent, by what machinery is he to be summoned? and if he disputes the debt, what means are to be adopted for trying his liability? No doubt, if the procedure in the third and following rules of the Order are applicable to the proceedings taken under the first and second rules, these questions are fully answered.

But there is nothing to show that they do.

On the contrary, the commencement of rule 3 seems to confer the right of proceeding under it and the following rules on "a plaintiff who has not lodged such statement, or a defendant who has obtained judgment against a plaintiff." And upon this too a serious question arises as to whether a plaintiff who had tried to proceed under rules 1 and 2, could, if those proceedings proved abortive, proceed under rule 3 and the subsequent rules at all.

Ordinary process.

The ordinary process for attaching debts in the County Court is for the judgment creditor, after he has obtained his judgment, to enter a *plaint* in the Court in which he has recovered judgment, lodging at the same time with the Registrar of the Court an affidavit, stating the recovery

Plaint.

Affidavit.

of the judgment, the fact of its being unsatisfied, and the fact of the garnishee being indebted to the judgment debtor, and being within the jurisdiction of the Court.

Course where garnishee not within jurisdiction of County Court.

If the garnishee be not within the jurisdiction of the Court where judgment was recovered, but within the jurisdiction of some other County Court, the judgment creditor will proceed in the latter Court, and enter his plaint there. In this case he must lodge a copy of the above-mentioned affidavit and a certificate of the judgment he has obtained, which he will get from the Registrar of the Court in which he recovered his judgment, with the Registrar of the Court in which he proposes to proceed against the garnishee. (See form of this certificate, *post*, in Appendix B, form 5.) For the entry of plaints generally, see Pitt Lewis's County Court Practice, Book i., c. 6.

The ordinary fee of 1*s.* in the £ is payable on the entry of the plaint.

Summons.

On the plaint being entered, a garnishee summons (see form 3 in Appendix B) is issued by the Registrar, and this must be served personally on the garnishee, and then it attaches the debt or debts in his hands. In fact, the service of this summons corresponds to service of the order *nisi* in proceedings in the Superior Courts. (Vide *ante*, pp. 171, 172.)

Service thereof.

However, if the garnishee be a firm or company or corporation, then Order XIX., rule 25, of the County Court Rules of 1876, allows, in lieu of personal service, service, as provided by rules 12 and 18 of Order VIII., on the firm or corporation.

Payment into Court.

On being served with this summons, the garnishee, if he admits the debt, can, five clear days before the return

day, pay the amount into Court, and if he does this, he is not liable for any costs incurred by the judgment creditor: the money will then be paid out to the latter and the proceedings will be at an end.

Trial. If however the garnishee disputes the debt, then the question as to his liability comes on for trial, like any ordinary County Court action instituted by plaint and summons, and all incidental proceedings that can be taken in an ordinary action can be taken.

Introduction of third party. If the garnishee suggests that any third party is entitled to the debt, or claims a lien or charge thereon, then such third party must be summoned to appear in the usual way to maintain his claim, and the proceedings would be analogous to those between the judgment creditor and the garnishee.

Judge may refuse to interfere. On the hearing the Judge may (under § 28 of the C. L. P. Act, 1860) in his discretion refuse to interfere where, from the smallness of the amount to be recovered or the debt sought to be attached, or otherwise, the remedy sought would be worthless or vexatious.

Judgment. The proceedings on the trial are the same as those on the trial of an ordinary action, and after going into the merits judgment will be given either for or against the garnishee. (See form of judgment, *post*, in Appendix B, form 6.)

No appeal. From this judgment there is no appeal (*Mason* v. *Wirral Highway Board*, L. R. 4 Q. B. D. 459).*

Execution. If the unsuccessful party do not pay the amount found

* In *Hall* v. *Pritchett* (L. R. 2 Q. B. D. 215) and *Dolphin* v. *Layton* (L. R. 4 C. P. D. 130) appeals were brought against the County Court Judge's decision, and were successful; but the point that no appeal lay was not taken, as no counsel appeared to oppose it.

due from him by the judgment, execution can issue against him for the same. (See form of execution, *post*, in Appendix B, form 7.)

Costs. *The costs* are in the discretion of the Judge, and will, as a rule, follow the event.

As has been already said, if, upon service of the summons upon him, the garnishee pays the debt into Court, he will not have to pay any of the costs of the judgment creditor.

APPENDIX.

APPENDIX A.

FORMS IN ATTACHMENT PROCEEDINGS IN THE HIGH COURT.

FORM 1.

SUMMONS TO JUDGMENT DEBTOR TO BE EXAMINED AS TO DEBTS OWING TO HIM.

In the High Court of Justice,

Division. 18 . No. .

Between . . . . . Judgment Creditor,

and

. . . . . Judgment Debtor.

Let all parties concerned attend the Master in Chambers on day, the day of , 18 , at o'clock in the noon, on the hearing of an application on the part of the above-named judgment creditor that the above-named judgment debtor should attend and be orally examined as to whether any and what debts are owing to him before the Master in Chambers, [*or* the District Registrar, &c., as the case may be], at such time and place as he may appoint, and that the said judgment debtor should produce his [books]* before the said Master at the time of the examination.

Dated the day of , 18 .

This summons was taken out by of , solicitor for , the above-named judgment creditor.

To , the above-named judgment debtor.

* Or as may be required.

FORM 2.

ORDER FOR EXAMINATION OF JUDGMENT DEBTOR.

In the High Court of Justice,
Division. 18 . No. .
, Master in Chambers.

Between . . . . . Judgment Creditor,
and
. . . . . Judgment Debtor.

Upon hearing , and upon reading the affidavit of , filed the day of , 18 , and

It is ordered that the above-named judgment debtor attend and be orally examined as to whether any and what debts are owing to him, before the Master in Chambers, at such time and place as he may appoint, and that the said judgment debtor produce his [books*] before the said Master at the time of the examination, and that the costs of this application be

Dated the day of , 18 .

FORM 3.

AFFIDAVIT OF JUDGMENT CREDITOR IN SUPPORT OF ORDER FOR EXAMINATION OF JUDGMENT DEBTOR.

In the High Court of Justice,
Division. 18 . No. .

Between . . . . . Judgment Creditor,
and
. . . . . Judgment Debtor.

I, , of , the above-named judgment creditor [*or* solicitor for the above-named judgment creditor] make oath and say as follows:—

1. By a judgment of the Court given in this action, and dated the day of , 18 , (a verified copy of which judgment is annexed hereto), it was adjudged that I [*or* the above-named judgment creditor] should recover against the above-named judg-

* Or as may be ordered.

ment debtor the sum of £ and costs to be taxed, and the said costs were by a Master's certificate dated the day of , 18 , allowed at £ .

2. The said still remains unsatisfied to the extent of and interest amounting to £ .

3. The said is within the jurisdiction of the Court and resides at .

4. I am [*or* the judgment creditor is] desirous that the said should be orally examined, by such person as the Court shall appoint, as to whether any and what debts are owing to him by any party or parties, and that, upon such examination he should produce his books [*or* as may be].

Sworn at , the day of , 18 .

Before me .

This affidavit is filed on behalf of the above-named judgment creditor.

FORM 4.

GARNISHEE ORDER (ATTACHING DEBT).

In the High Court of Justice.

Division 18 . No. .

, Master in Chambers.

Between . . . . . Judgment Creditor,

and

. . . . . Judgment Debtor,

. . . . . Garnishee.

Upon hearing , and upon reading the affidavit of , filed the day of , 18 , and

It is ordered that all debts owing and accruing due from the above-named garnishee to the above-named judgment debtor be attached to answer a judgment recovered against the said judgment debtor by the above-named judgment creditor, in the High Court of Justice, on the day of , 18 , for the sum of £ , on which judgment the said sum of £ remains due and unpaid.

And it is further ordered that the said garnishee attend the Master in Chambers on day, the day of , 18 , at o'clock in the noon, on an application by the said judgment debtor that the said garnishee pay the debt due from him to the said judgment debtor, or so much thereof as may be sufficient to satisfy the judgment.

And that the costs of this application be

Dated the day of , 18 .

FORM 5.

AFFIDAVIT OF JUDGMENT CREDITOR IN SUPPORT OF ORDER NISI.

[*Heading as in Form* 3.]

I, , of , the above-named judgment creditor [*or* solicitor for the above-named judgment creditor] make oath and say as follows :—

1. By a judgment of the Court given in this action, and dated the day of , 18 , it was adjudged that I [*or* the above-named judgment creditor] should recover against the above-named judgment debtor the sum of £ and costs to be taxed; and the said costs were by a Master's Certificate dated the day of , 18 , allowed at £ .

2. The said still remains unsatisfied to the extent of , and interest amounting to £ .

3.* , is indebted to the judgment debtor, , in the sum of £ , or thereabouts.

4. The said is within the jurisdiction of this Court.

Sworn at , the day of , 18 .

Before me, .

This affidavit is filed on behalf of , the above-named judgment creditor.

* Name, address, and description of garnishee.

FORM 6.

GARNISHEE ORDER (ABSOLUTE FOR PAYMENT).

[*Heading as in Form* 4.]

Upon hearing , and upon reading the affidavit of , filed the day of , 18 , and whereby it was ordered that all debts owing or accruing due from the above-named garnishee to the above-named judgment debtor should be attached, to answer a judgment recovered against the said judgment debtor by the above-named judgment creditor, in the High Court of Justice, on the day of , 18 , for the sum of £ , on which judgment the said sum of £ remained due and unpaid.

It is ordered, that the said garnishee do forthwith pay the said judgment creditor the debt due from him to the said judgment debtor [*or* so much thereof as may be sufficient to satisfy the judgment debt], and that in default thereof execution may issue for the same, and that the costs of this application be

Dated the day of , 18 .

FORM 7.

ORDER DIRECTING ISSUE BETWEEN JUDGMENT CREDITOR AND GARNISHEE.

[*Heading as in No.* 4.]

Upon hearing , and upon reading the affidavit of , filed on the day of , 18 , and

It is ordered that the above-named , the judgment creditor, and the above-named , the garnishee, do proceed to the trial of an issue wherein the judgment creditor shall be the plaintiff and the garnishee the defendant, and the question to be tried therein shall be whether the garnishee was, at the time of the service of the order *nisi* herein upon him, viz., on the day of , 18 , indebted to the above-named judgment debtor.

And it is further ordered that this issue be prepared and delivered by the plaintiff therein within from this date, and be returned by the defendant therein within days and be tried at

And it is further ordered that the question of costs and all further questions be reserved until after the trial of the said issue.

Dated the day of , 18 .

FORM 8.

GARNISHEE ISSUE.

In the High Court of Justice,
Division. 18 . No. .
Between . . . . . Plaintiff,
and
. . . . . Defendant.
Garnishee issue.

Delivered the day of , 18 , by , solicitor for the above-named plaintiff, pursuant to a garnishee order of [Master Smith] dated the

The plaintiff, *A.B.*, affirms, and the defendant, *E. F.*, denies that the defendant *E. F.* was indebted to *C. D.*, of [*name, address, and description of the judgment debtor*], in the sum of £ , or some other sum, at the time of the service on the defendant *E. F.* of the order *nisi*, dated the day of , 18 .

And it has been ordered by Master Smith that the said question shall be tried by a jury, and that the said matter should be tried at

Therefore let a jury come, &c.

FORM 9.

ORDER DIRECTING SPECIAL CASE BETWEEN JUDGMENT CREDITOR AND GARNISHEE.

[*Heading as in No.* 4.]

Upon hearing , and upon reading the affidavit of , filed on the day of , 18 , and

It is ordered that the question as to the liability of the garnishee herein be tried by means of a special case to be agreed upon between the above-named judgment creditor and the garnishee, such special case to be prepared by the judgment creditor and submitted to the garnishee within days, and returned approved by the garnishee within days, and that any question that may arise as to the form of such case be submitted to and determined by the Master sitting at Chambers.

And it is further ordered that the question of costs and all further questions be reserved until after the hearing of the said special case.

Dated the day of , 18 .

FORM 10.

ORDER CALLING ON THIRD PERSON TO APPEAR.

In the High Court of Justice,
Division. 18 . No. .
, Master in Chambers.

Between . . . . . Judgment Creditor,
and
. . . . . Judgment Debtor,
and
. . . . . Garnishee,
and
. . . . . Claimant.

Upon hearing , and upon reading the affidavit of , filed on the day of , 18 , and

It is ordered that the further hearing of the parties to the order *nisi* herein, dated the day of , 18 , wherein it is ordered that all debts due and owing and accruing due from the above-named garnishee to the judgment debtor shall be attached to answer a judgment recovered against the judgment debtor by the judgment creditor, shall stand adjourned until .

And let *M. M.*, the party alleged to be entitled to the said debt, and the judgment creditor and the garnishee, attend the Master in Chambers on the day of , 18 , to state the nature and particulars of their respective claims to such debt, and maintain or relinquish the same, and abide such order as may be made herein.

Dated the day of , 18 .

APPENDIX B.

FORMS OF ATTACHMENT PROCEEDINGS IN THE COUNTY COURT.

FORM 1.

NOTICE OF DESIRE TO EXAMINE DEFENDANT AS TO CERTAIN DEBTS DUE TO HIM.

No. of Plaint.

In the County Court of , holden at .

Between *A. B.* . . . . . Plaintiff,

and

C. D. . . . . . Defendant.

I, the above-named plaintiff, am desirous, should I succeed in obtaining a judgment against the defendant, of having him examined forthwith after I have obtained such judgment, as to whether or not the following debts are due to him from the following persons: viz.

E. F. of , for goods sold and delivered.

G. H. of , for work done.

(Signed) *A. B.*

To the Registrar of the above Court. Dated this day of , 18 .

FORM 2.

ORDER WHEN GARNISHEE PRESENT.

No. of Plaint.

In the County Court of , holden at .

Between *A. B.* . . . . . Plaintiff,

and

C. D. . . . . . Defendant,

E. F. . . . . . Garnishee.

Whereas the plaintiff has obtained a judgment against the defendant for the sum of £ , [*here insert the amount of judgment*]:

Upon examination of the defendant and *E. F.*, of , it is ordered that all debts due and owing, or accruing due from the said *E. F.* to the above-named defendant, shall be attached to answer the said judgment debtee.

And it is further ordered that the said *E. F.* do pay into Court the sum of £ , being the amount of the debt due from him to the above-named defendant [*or* being so much of the debt due from him to the above-named defendant as is sufficient to satisfy the said judgment debt], on the day of .

The day of , 18 . By the Court,

Registrar of the Court.

FORM 3.

SUMMONS UPON A GARNISHEE.

No of Plaint.

In the County Court of , holden at .

Between *A. B.*, Plaintiff,
[*Address and Description,*]
and
C. D., Defendant,
[*Address and Description,*]
and
E. F., Garnishee,
[*Address and Description.*]

Whereas the plaintiff at a Court holden at , on the day of , 18 , obtained a judgment against *C. D.* of [*name, address and description*], for the sum of £ , for and costs, which judgment remains unsatisfied.

And whereas the plaintiff having filed an affidavit stating that you are indebted to the said *C. D.*, you are hereby summoned to appear at a Court holden at , on the day of , 18 , at the hour of in the noon, to show cause why an order should not be made upon you for payment of the amount of the said judgment, or so much thereof as shall equal the amount of the debts due and owing and accruing from you to the said *C. D.*

And take notice, that from and after the service of the summons upon you all such debts are attached to answer the said judgment,

and that if you shall pay the said debts to the said *C. D.* or otherwise dispose of them, you will be liable to be committed for contempt.

And further take notice, that if you shall pay to the registrar of the Court, the amount of such debts, or so much thereof as will satisfy the judgment debt, five clear days before the day you are required to appear, you will incur no costs.

Dated this day of , 18 .

Registrar of the Court.

To , the garnishee.

NOTE.—*Rules* 5 *and* 6 *of Order* 24 *to be printed on back of summons.*

FORM 4.

AFFIDAVIT FOR LEAVE TO SUMMON GARNISHEE.

No. of Plaint.

In the County Court of , holden at .

Between *A. B.* . . . . . Plaintiff,

and

C. D. . . . . . Defendant.

I, *A. B.*, of , in the county of , the above-named plaintiff, make oath and say:

1. That I, on the day of last, recovered a judgment in the County Court of , holden at , in this action against the above-named defendant for the sum of £ debt and costs.

2. That the said judgment is still wholly unsatisfied [*or* is still unsatisfied to the sum of £ , part of the said judgment so recovered as aforesaid.]

3. That *E. F.*, of , in the county of , is indebted to the said defendant in the sum of £ for .

4. That the said *E. F.* resides or carries on business within the district of this honourable Court [*or* that the cause of action between the said defendant and the said *E. F.* arose wholly or in part within the district of this honourable Court, *or* that the said *E. F.* dwelt or carried on business within the district of this honourable Court within six calendar months of this, the day of , 18 .]

Sworn, &c.

FORM 5.—CERTIFICATE OF ORDER, &c. OF COUNTY COURT.

The County Court of , holden at
MINUTES OF JUDGMENTS, ORDERS, and other PROCEEDINGS at a Court held at , on the
day of , 18 , before , Judge of the said Court.

No.	Plaintiff.	Appearance.	Defendant.	Appearance.	Particulars of Claim.	Amount claimed.	Special Defence.	By whom Jury required.	For whom Judgment given.	Amount of Judgment.	Costs.	Order.

	£	s.	d.
Amount of Judgment or Order, including Cost .			
Subsequent Costs			
Paid into Court			
Total sum now due			

I HEREBY CERTIFY that the above is a true copy of an entry in the Minute Book, Judgments, Orders, and other Proceedings of the County Court, holden at

Dated this day of , 18 .

Registrar.

Note.—If the Judgment or Order is entered in any Minute or Order Book of a different form to the above, then the certificate must follow the form of such book.

FORM 6.

JUDGMENT AGAINST GARNISHEE.

In the County Court of , holden at .

Between *A. B.* . . . . . Plaintiff.

and

E. F. . . . . . Defendant.

Whereas the plaintiff, at a Court holden at , on the day of , 18 , obtained a judgment against *C. D.* of , for the sum of £ for and for costs, and which judgment remains now unsatisfied: And whereas the plaintiff having filed an affidavit stating that the defendant was indebted to the said *C. D.*, the defendant was summoned to show cause why he should not be ordered to pay the amount of the said judgment or so much thereof as should equal the amount of the debts due and owing and accruing from him to the said *C. D.*; and the defendant having failed to appear before the Court this day [*or* appeared before the Court this day, and having failed to show cause why he should not be ordered to pay such debts, *or* having shown sufficient cause why he should not be ordered to pay such debts:]

It is ordered, that the plaintiff do recover against the defendant the sum of £ [*here insert the amount of the judgment debt, or so much thereof as the debts amount to when the same are less than the judgment debt*] and £ for costs, amounting together to the sum of £ [*or* that the plaintiff do pay the sum of £ for defendant's costs].

It is ordered that the defendant [*or* plaintiff] do pay the same to the Registrar of the Court on the day of , 18 , [*or where judgment for plaintiff and the Judge so order*, by instalments of for every days, the first instalment to be paid on the day of , 18 .]

Dated the day of , 18 .

FORM 7.

EXECUTION AGAINST GARNISHEE.

[*Heading as in No.* 6.]

Whereas on the day of , 18 , it was ordered that *E. F.* should pay into court the sum of £ , being the [*or* so much of the] amount of debts found due from him to *C. D.* of [*here insert*

address and description], a judgment debtor of *A. B.* [*or* as is sufficient to satisfy the judgment of the said *A. B.*], and whereas default has been made in payment of the said order; these are therefore to require and order you forthwith to make and levy by distress and sale of the goods and chattels of the defendant, wheresoever they may be found within the district of this Court (except the wearing apparel and bedding of him or his family, and the tools and implements of his trade, if any, to the value of five pounds), the sum stated at the foot of this warrant, being the amount due to the plaintiff under the said order, including the costs of this execution; and also to seize and take any money or bank notes (whether of the Bank of England or of any other bank), and any cheques, bills of exchange, promissory notes, bonds, specialties, or securities for money, of the defendant, which may there be found, or such part, or so much thereof as may be sufficient to satisfy this execution and the costs of making and executing the same, and to pay what you shall have so levied to the Registrar of this Court, and make return of what you have done under this warrant, immediately upon the execution thereof.

Given under the seal of this Court this day of , 18 .

By the Court,

Registrar of the Court.

To the High Bailiff of the Court,
and others the Bailiffs thereof.

	£	*s.*	*d.*
Amount for which judgment was obtained . .			
Paid into Court			
Remaining due			
Poundage for issuing this warrant . . .			
Total amount to be levied . . .			

NOTICE.—The goods and chattels are not to be sold, until after the end of five days next following the day on which they were seized, unless they be of a perishable nature, or at the request of the defendant.

Application was made to the Registrar for this warrant at minutes past the hour of in the noon of the day of , 18 .

19 & 20 Vict. c. 108, § 46.

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